

MAPPING THE FREEDOM TO LEARN: MAKING THE CASE FOR STUDENT
ACADEMIC FREEDOM IN CANADA

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ABSTRACT

Academic freedom has been defined as having two components: the freedom to teach and the freedom to learn. However, whether there is truly a freedom to learn and how it intersects with general liberties is unresolved. Incorporating a critical pedagogical approach, this thesis explores whether Canadian post-secondary students have any such role-related rights. In aiming to map the conditions that might safeguard such a freedom to learn, certain civil liberties are examined – namely associational and expressive freedoms. A critique of contemporary jurisprudence and relevant legislation is situated within an historical and comparative context of academic freedom and students in Canada and United States. It examines how reinforcing robust civil liberties is necessary for supporting role related academic freedom rights on campus. This thesis proposes that it is necessary for both faculty and students to recognize the precarious and sometimes competing rights and freedoms to support the broader goals of academic freedom – to develop knowledge and inquiry for the common good and to foster critical independence of mind.

DEDICATION

To my brother Gabriel – because you teach me more about wisdom, strength, and life than any book or course ever will.

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Chapter 1 – Introduction: Towards a Freedom to Learn

Education either functions as an instrument which is used to facilitate integration of the younger generation into the logic of the present system and bring about conformity or it becomes the practice of freedom, the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world.

- Paulo Freire, *Pedagogy of the Oppressed*¹

Students in Canada should be concerned about academic freedom. Academic freedom, freedom of speech, and collective student organizing all shape the conditions under which students participate in their education. In this current climate, how do they learn to think, solve problems, fix disasters, work in groups, understand democracy, make art, and understand the tangible and intangible questions about life? And what does academic freedom have to do with facilitating a transformative and critical educational experience for students? Students are actively engaged in their social, political, and pedagogical environments, sometimes instigating monumental transformation. Yet, too often is their role underemphasized or overlooked. Their engagement in the discourse of academic freedom and other liberties has been the focus of very little scholarly examination in Canada. Their collective action has also been frequently overlooked.

The foundational assumptions of this thesis are very simple. Derived from Johann Gottlieb Fichte, there are two components to academic freedom: the freedom to teach and the freedom to learn. One cannot flourish without the other. While instructors are entrusted with the expertise and credentials to have their academic freedom to teach and research and critique, students must be able to engage in the practice of academic freedom in order to learn to participate in what critical pedagogue Paolo Freire (1970) defines as “authentic thinking.” Authentic thinking, Freire analyzes, is that type of thinking connected with reality and extends outside of the ivory tower. Many academic

¹ Paulo Freire, *Pedagogy of the Oppressed* (London: Continuum, 1970).

theorists, such as Finkin and Post (2009),² have identified that the objectives of an instructor's academic freedom is to foster "critical thinking and independence of mind" in students. Thus, this thesis begins from the premise that there exists an intimate symbiosis between teaching and learning. Also to be explored is the relationship between the special role-related rights of the academy and the general civil liberties required to support these special rights. However, the practical application of such a symbiotic relationship is less simple and requires consideration of how the competing goals of conformity and freedom interact in academia, as articulated in the above quote by Freire. These competing objectives in the learning process – conformity and freedom - foster contradictions, power struggles, discomfort and can lead to conflict and disruption.

Unfortunately, there are contemporary pressures to limit civil liberties on campus and narrow the parameters of academic freedom, ultimately affecting both the teaching and learning conditions of faculty and students. The national association of university presidents, the Association of Universities and Colleges in Canada (AUCC), has recently made moves to withdraw commitment to freedom of expression to both professors and students. By neglecting to include "extramural expression" as a component of academic freedom in its newly revised policy, and arguing before the courts that institutional autonomy shields universities from committing to freedom of expression, the ability to critique and engage in controversial debate is at risk in our universities. Added to the diminishing commitment to expressive freedoms, AUCC's newly revised statement on academic freedom signals an attempt to entrench their autonomy to discipline students as well as faculty without external scrutiny. Part of this trend is occurring with the erosion of union security on campuses. More generally, AUCC's actions signify attempts to

² Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven: Yale University Press, 2009).

unilaterally rewrite the definition of academic freedom. With this, and a clear diversion from committing to a collegial structure, private donors are attempting to play a larger role in steering the academic direction of universities. In addition to documented concerns about the threats some private donors pose to research integrity, there is also growing concern about efforts to silence controversial student debate or weaken student collective action on campus. Thus, the approaches to student relations can also affect the legal and political undertakings of a contemporary university campus.

With calculated plans to attract and increase the amount of private funding sources to university coffers, the trend of universities adopting a "private sector mentality"³ or a business-model of governance seems to have accelerated. One of the most recognizable trends associated with in this shift has been noted in the concerted push back against union activities. The increasing use of casual academic labour, accompanied by the erosion of tenure, imperils academic freedom, quality teaching, and democratic engagement in the collegial structure of the university.⁴ This departure from collegiality and unionism may also influence attitudes toward student organizing as Canadian students have largely modeled their associating on a trade union structure. Collectively students have provided advocacy, services, and events, maintaining associational security through mandatory fees. This associating has been crucial for their participation in the democratic structures of the university. But at times both labour unions and student unions are seen to be disruptive to managerial models of

³ James L. Turk, ed, *The Corporate Campus: Commercialization and the Dangers to Canada's Colleges and Universities*, (Toronto: Lorimer, 2000) 7.

⁴ See Howard Woodhouse, *Selling Out: Academic Freedom and the Corporate Market*. (Montreal: McGill-Queen's University Press, 2009); Sheila Slaughter and Larry Leslie, *Academic Capitalism: Politics, Policies, and the Entrepreneurial University*. (Baltimore: John Hopkins University Press, 1997); Ellen Schrecker, *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom and the End of the American University* (New York: The New Press, 2010).

governance – especially when these unions raise issues with respect to working conditions and learning conditions.

A critique of student rights in Canadian universities can be framed in both critical pedagogical and critical epistemological foundations. Critical pedagogue, Paolo Freire, argues that, in order to advance liberation through education, the student-teacher relationship must be critically examined. He criticizes what he calls the “banking’ concept of education in which the scope of the action allowed to students extends only as far as receiving.”⁵ He further argues that such a banking approach fosters oppression by negating the processes of inquiry. As such, when educational institutions replicate such a banking concept, neither the teacher nor the student enjoys any scholarly freedoms. Drawing from critical epistemology assists in framing a critical understanding of universities as regulatory institutions – interacting with legislative, judicial, quasi-judicial and social apparatuses. Situated in their historical context, Dorothy E. Smith (2000) asserts, “[u]niversities in Canada were founded in and were integrated with the ruling apparatus of imperial power that were implicated in the genocidal treatment of the peoples native to the territory we call Canada, institutions of slavery, the subjugation of other civilizations...and the exploitation of the resources of land and people in the subjugated regions.”⁶ Thus, while higher educational institutions are grounded in these socio-historical conditions, they have also been the sites of dramatic transformation engaged in justice, freedom and fostering other ideals towards an equitable and democratic society. Over the last century, students have participated actively and meaningfully in such transformations, altering the conditions of learning by engaging in the governing structures, making demands for progressive curricular changes, and

⁵ Freire, 1970, p.72.

⁶ Dorothy E. Smith, “Regulation or Dialogue,” Sharon E. Kahn and Dennis Pavlich, eds, *Academic Freedom and the Inclusive University*, (Vancouver: UBC Press, 2000) 151.

creating diverse social, cultural, and political activities in post-secondary institutions.⁷ However, universities continue to maintain and reinforce significant hegemonic authority in broader systemic practices of power. And as Moses (2001)⁸ ascertains, dominant forces are often able to thwart dissent through successful co-optation of the interests of subordinate, or less socially powerful, voices. Thus, this critical examination considers the interaction between student activities and regulatory practices from university administrations, legislation, and the law.

Critical pedagogues maintain that there is a foundational public interest in education. Giroux and Giroux (2006) argue that:

[H]igher education should be an institution that offers students the opportunity to involve themselves in the deepest problems of society and to acquire the knowledge, skills, and ethical vocabulary necessary for critical dialogue and broadened civic participation.⁹

Thus, a student's academic endeavours become intricately linked to the exercise of civil liberties in a democracy. This public interest in higher education deeply affects its relationship to the law, governments, civil society, and universities and colleges. However, the question of public interest in education is challenging. Contestations among indoctrination, balance, neutrality, and individual and collective rights intersect within debates of academic freedom and pedagogy. Building from Giroux and Giroux, what are these "opportunities" that students require in order to acquire the knowledge, skills, and vocabulary for critical thinking and civic participation? In other words, what entitlements do students have in their learning pursuits? Are they strictly entitled to the

⁷ See Henry A. Giroux and Susan Searls Giroux, *Take Back Higher Education: Race, Youth, and the Crisis of Democracy in the Post-Civil Rights Era*. (New York: Palgrave MacMillan, 2004), and, Anthony J. Nocella, Steven Best and Peter McLaren, eds, "Introduction," *Academic Repression: Reflections from the Academic Industrial Complex* (Edinburgh: AK Press, 2010) 13-89.

⁸ Nigel R. Moses, "Student Organizations as Historical Actors: The Case of Mass Student Aid," (2001) XXXI: 1 *The Canadian Journal for Higher Education*, 75-120.

⁹ Henry A. Giroux and Susan Searls Giroux, *Take Back Higher Education: Race, Youth, and the Crisis of Democracy in the Post-Civil Rights Era*. (New York: Palgrave MacMillan, 2004), p. 279.

delivery of formal education or are there broader philosophical goals that can be pursued in higher education?

If a primary function of higher education is the formation of critical thinking, then students require certain rights and freedoms in their special role in the academy. As shall be explored, some of these entitlements include quality education by faculty who enjoy academic freedom, access to higher education and education materials, a variety of disciplinary course offerings, and opportunities to engage in campus activities outside the classroom and to organize collectively. Their learning conditions also require access to the collegial governing structure in order to participate in the development of academic and student life programming. For these learning conditions, robust safeguards for civil liberties are also necessary.

Positioning this examination from a critical epistemological standpoint, I rely on the foundational assumption that regulatory practices are not neutral activities. University policies and their quasi-judicial structures, jurisprudence and legislation all do not exist outside of the relations of power. Universities, the courts, and governments are all elements of the ruling apparatus, as defined by Dorothy E. Smith (1990). The university as a component of the ruling apparatus perpetuates its own discourse embedded in these relations of power. Academic freedom, research integrity, academic rigour and competency, collegiality, equity, diversity, access, innovation, and excellence are common elements of the discursive practices weaving through the regulatory practices of universities. As Smith notes, "depths and complexities of ruling interpose between local actualities and textual surfaces."¹⁰ If we consider jurisprudence and the law as examples of these textual surfaces, we must understand it can be one-sided representing the understanding of such issues only from the top of the ruling ladder.

¹⁰ Dorothy E. Smith, *Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Boston: Northeastern University Press, 1990) 83.

Thus, while this thesis examines jurisprudence, institutional policies, and legislation, the analysis is supplemented with some content from the media – mainly student media. Through this analysis, I question how much can we rely on legal and quasi-legal apparatuses to support emancipatory activities in education. Further, I will highlight how such notions of “freedom” and “rights” are at times co-opted, misappropriated, or simply misinterpreted causing the undermining of their very meanings.

The necessary conditions for providing academic staff the protections to foster the freedom to teach and academic freedom more generally have been chronicled extensively – in articles and books, popular media, and through collective agreements and university policies. Namely, the relationship between tenure, collegial governance, and academic freedom has been well established.¹¹ In contrast, the conditions that foster a freedom to learn – that component of academic freedom that pertains to students – have been the subject of little analysis – particularly in Canada. In fact, whether, and to what extent, students have any rights or freedoms on campus continues to be disputed.¹² While civil liberties are generally acknowledged on campus, Canadian jurisprudence recognizes only the disparate rights of students. Thus at a pragmatic level, higher education is increasingly important in the work force, making the stakes for students to succeed high, students can be assured that the courts can oversee their interests at least through judicial review and human rights codes. Increasingly, when student rights surface, they are often characterized from an increasingly consumerist approach and are increasingly being taken to the courts to resolve disputes with their

¹¹ Michiel Horn, *Academic Freedom in Canada: A History*. (University of Toronto Press: Toronto, 1998).

¹² This will be explored further in Chapter 2. See for some examples, Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven: Yale University Press, 2009); Stanley Fish, *Save the World on Your Own Time* (Oxford: Oxford University Press, 2008); Claude Bissell, “Academic Freedom: The Student Version” (1969) 76:2 *Summer Queen’s Quarterly*; and, Michiel Horn, *Academic Freedom in Canada: A History*. (University of Toronto Press: Toronto, 1998).

universities.¹³ Contemporary students are faced with extensive marketing and public relations from universities promoting to students their endless possibilities to make choices and participate actively and independently in their educational pursuits. However, there are fears that these seeming choices are directed by a commodification of education – where the line is blurred between the student and consumer.¹⁴ Skyrocketing tuition fees, rising class sizes, privatization of campus spaces have transformed the choices available for students. And in this economic context collectivism, critical thinking, and even hard work, may be considered undesirable choices for the student as consumer.¹⁵ As Giroux and Giroux maintain: “The message to students is clear: customer satisfaction is offered as a surrogate for learning.”¹⁶ I argue that this is a misdirection that requires realignment with the foundational goals of academic freedom and the fundamental purpose of education – to foster “mature independence of mind” for the common good.¹⁷ This is why it is important to turn to the field of critical pedagogy to examine the role of higher education in Canadian society.

This thesis comes at an interesting time in Canada’s trajectory of post-secondary education. Throughout the past several decades, students have become engaged in university governance, in the courts, and on the streets to defend their academic conditions, their extra-curricular conditions, and access to education. While post-secondary administrations have been responsive to many of the associational and expressive student activities, concerns are being raised about the proliferation of

¹³ Amy Gajda, *The Trials of Academe: The New Era of Campus Litigation* (Cambridge: Harvard University Press, 2009).

¹⁴ Giroux and Giroux, 2006.

¹⁵ Howard Woodhouse, *Selling Out: Academic Freedom and the Corporate Market* (Montreal: McGill-Queen’s University Press, 2009).

¹⁶ Giroux and Giroux, 2006, p. 275.

¹⁷ Finkin and Post, 2009.

regulatory activities on campuses interfering with the exercise of student civil liberties and their learning conditions. Examples include: the increased implementation of codes of student conduct, respectful workplace policies, restricted space booking procedures, and threats to autonomous and collective student organizing. While these concerns about student civil liberties are general constitutional issues, does a relationship exist between them and the general values and ideals of academic freedom?

Students in regions across the country have collaborated to challenge both legislative provisions and institutional policies considered to be unjust or in violation of their personal and collective rights. For example, the 2012 Quebec student strikes against the former Charest government's intentions to lift a tuition fee freeze garnered international responses of solidarity, while also eliciting disdain and criminalization, for their militant opposition to the tuition fee increases. These student strikes generated heightened public interest in post-secondary education, legislation that regulates it, and the relationship to broad associational and expressive freedoms.¹⁸ But it is not only in Quebec where students are engaging in debate and dialogue about higher education and how the delivery of such education intersects with their civil liberties. In several regions across Canada, students are challenging, both in the courts and at their institutions, their right to express and critique and debate, to associate and access campus space, to participate in university governance,¹⁹ while also remarking on what they identify as a rise of security presence²⁰ and conduct regulation in campus life.

¹⁸ See for example Ethan Cox, "UN High Commissioner for Human Rights criticizes Quebec" (18 June 2012) rabble.ca online: <<http://rabble.ca/blogs/bloggers/ethan-cox/2012/06/un-high-commissioner-human-rights-condemns-human-rights-violations->>; and, Abby Deshman, "CCLA denounces drastic, broad infringements of fundamental constitutional rights in Quebec Bill 78" (22 May 2012) Public Statement of the Canadian Civil Liberties Association, online: <<http://ccla.org/2012/05/22/ccla-denounces-drastic-broad-infringements-of-fundamental-constitutional-rights-in-quebec-bill-78/>>.

¹⁹ See for example, "Student union and Lakehead U. board at odds," (26 April 2012) CBC News, online: CBC News <<http://www.cbc.ca/news/canada/thunder-bay/story/2012/04/26/tby-lusu-challenge.html>>

In attempting to frame a symbiotic academic freedom, it must be noted that teaching freedoms and learning freedoms are not always seen to be harmonious pursuits. Academic freedom rights of faculty are sometimes portrayed as antagonistic to student rights, such as in the delivery of student evaluations or the Students for Academic Freedom movement in the United States, which aims to pit students against professor freedoms in the classroom. However, I argue that these tensions are often misguided, serving to obfuscate the common goals and challenges that students and faculty both face on campus. In fact, what I will argue is that faculty and students have more in common in their efforts to assert and safeguard their rights than they have in conflict with each other. A lack of solidarity and the absence of a shared commitment to liberating pedagogy only serve to fuel consumerism and individualism in education.

As the student population in universities has dramatically diversified over the last century, universities have been confronted several challenges in promoting equity and diversity.²¹ As a result, critiques have been launched about the interaction between academic freedom, free speech and discrimination and harassment. Where there is a greater diversity of cultural, political and religious beliefs in exchange, how does a university commit to ensuring that academic freedom and freedom of speech are safeguarded, while preventing the silencing and harm that occurs as a result of discriminatory and harassing behaviour? As Macfarlane (1997)²² asserts, universities have a duty to protect students from discrimination while maintaining a mandate to seek truth and push the boundaries of inquiry and intellectual questioning. In other words,

²⁰ Erin Hudson, "Private security in a public university" (4 Feb 2012) *McGill Daily*. Online: McGill Daily <<http://www.mcgilldaily.com/2012/02/private-security-in-a-public-university/>>.

²¹ Shibao Guo and Zenobia Jamal, "Nurturing Cultural Diversity in Higher Education: A Critical Review of Selected Models" (2007) 37:3 *Canadian Journal of Higher Education* 27-49.

²² Judith Macfarlane, "Beyond the Right to Offend: Academic Freedom, Rights and Responsibilities in the Canadian University Classroom" (1997) 20 *Dalhousie L.J.* 78.

academic freedom does not shield an instructor who engages in harassing or discriminatory behaviour. However, inasmuch as discrimination can deter a student from fully engaging in education, the sanitization of controversial topics from the classrooms, hallways, and student centres on campus can also suppress meaningful participation in critical questioning. If spaces to raise deeply disturbing and sometimes uncomfortable questions are limited, a chilly climate can impede especially those occupying the most vulnerable positions on campus – such as casual academic labourers and students.

Judy Rebick notes that a “chilly climate” in higher education affects faculty and students alike. Students in a chilly climate “don’t feel they can express their ideas freely in the classroom.”²³ Even though contemporary universities are significantly more diverse and inclusive than a century ago, they still maintain and are rooted in elitist, hegemonic, and patriarchal structures. Power relations and economic forces continue to attempt to influence teaching and research in post-secondary institutions. We will see how some forms of criticism and political debate tend to become subject to silencing, such as in debates which critically question the Israeli/Palestinian conflict. Especially in this context, debates about the relationship between harassment, free speech, and academic freedom have emerged. Such debates that seek to foster safe spaces and eliminate discrimination and harassment need to be critically examined within a framework of understanding how the academy is simultaneously susceptible to be complicit in facilitating the spaces for such inequalities.²⁴ Faculty have organized to resist the chilly climate by unionizing and defending tenure, academic freedom and collegiality. Students have similarly organized to be involved in the collegial structure,

²³ Judy Rebick, “Inclusion and the Academy: Debating a Good Idea Freely” Sharon E. Kahn and Dennis Pavlich, eds, *Academic Freedom and the Inclusive University* (Vancouver: UBC Press, 2000) at 60.

²⁴ Smith, Dorothy, 2000; Rebick, 2000.

collectively organized, and claimed student spaces on campuses, in order to protect and enhance their educational experiences.

In order to examine the interaction between students and the struggle for academic freedom, this thesis considers what structural conditions support, and also those which impede students' freedom to learn. I will propose that there is a need to revisit the robustness of civil liberties on Canadian campuses – namely associational and expressive freedoms – which provide the conditions to promote the freedom to learn. Even though this thesis investigates a students' freedom to learn, it must be noted that it focuses almost exclusively on *extra-curricular* student activities, or those activities that occur *outside* of the classroom. This is because, as I argue, these activities facilitate important spaces where students participate and experiment in civil society – where they practice the knowledge and skills which part of the process of developing “critical independence of mind”. If we confine the student pedagogical experience exclusively to the experience of instruction, examination, tutelage, and grading, we omit a vast component of the learning experience that becomes part of the academic community on campus. Thus this freedom to learn refers to the ability to engage in what Freire calls “authentic thinking” – that thinking which is engaged with reality and intended to liberate (or foster independence of mind) and promote critical thought. Thus, I draw attention to how students in Canada have engaged in such forms of authentic thinking through their collective organizing on campus. It is these activities that need to be safeguarded by robust civil liberties.

This paper examines the intersections of legislative, judicial, and quasi-judicial regulatory efforts to manage students' individual and collective activities within a socio-historical context. To begin the analysis of post-secondary students in Canada and how debates of academic freedom influence student experiences of higher education, the thesis starts with an overview of the vast literature on higher education and academic

freedom. Chapter 2 reviews the literature on the development of academic freedom discourse in Canada and the United States. It returns to Johann Gottlieb Fichte's foundations of "*Akademische Freiheit*" and its two original components: *Lehrfreiheit*—freedom to teach – and *Lernfreiheit* - freedom to learn. From here, the chapter examines the political, theoretical, and judicial conditions contributing to the manifestation of academic freedom in both nations. It subsequently chronicles the emergence of student activism and autonomous student organizing as some departures are made from *in loco parentis* approaches to student relations. As such it explores both how the concept of *Lernfreiheit*, or freedom to learn, has been either embraced, rejected, or ignored in discourses of academic freedom. The chapter observes that the revival of a neo-conservative "student academic freedom" movement in the United States after September 11, 2001 presented new challenges to academic freedom, and teaching and learning. It also considers how collective organizing among students, manifesting through associational and expressive activities, supported professorial pursuits for academic freedom and collegiality. The chapter also compares the jurisprudence on academic freedom and freedom of expression of Canada and the United States, noting the significant divergences between the two nations.

Moving from the historical review of the literature in Chapter 2, the subsequent chapters aim to investigate the legislative, judicial, and quasi-judicial frameworks interacting with post-secondary students in Canada. Chapter 3 begins that exploration by providing an overview of Canadian jurisprudence in higher education. It chronicles in particular the extent to which university activities are subject to *Charter* scrutiny, by examining seminal decisions such as *McKinney*,²⁵ *Freeman-Maloy*,²⁶ and *Pridgen*.²⁷ It

²⁵ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229.

²⁶ *Freeman-Maloy v. Marsden*, 79 OR (3d) 401 [2006] OJ.

further investigates the contemporary trends in higher education law in Canada, particularly as students are gaining more opportunities to claim tort damages. I argue against increased litigation on university campuses as it erodes collegiality and interferes with academic freedom. However, despite my advocacy for limited court interaction on campus issues, I conclude that universities should proactively embrace a commitment to the *Charter* instead of litigating against their obligations to it.

Chapters 4 and 5 explore how associational and expressive freedoms are necessary conditions for upholding the objectives of freedom to learn, critical thinking and student collective organizing on Canadian campuses.

Associating has been crucial for students to realize strength in numbers and come together on a variety of issues and interests. Thus, Chapter 4 focuses on associational freedoms as they pertain to student activities in post-secondary institutions. Since the sixties when student associations had for the most part become autonomous from university administrations, they became active independent bodies on campus that operate in ways similar to trade unions. Some provinces established legislation recognizing their role representing students in post-secondary institutions, providing them with dues security, access to membership lists, and other resources to ensure their democratic purpose in civil society.²⁸ There are some indications, however, that provinces, administrations, and individuals may be acting to destabilize students' union security. This chapter looks into some of those threats, such as the Quebec special law which attempted to halt the student strike - Bill 78, *An Act to enable students*

²⁷ *Pridgen v. University of Calgary*, 2012 ABCA 139; *Pridgen v. University of Calgary*, 2010 ABQB 644.

²⁸ In Quebec: *An Act respecting the accreditation and financing of students' associations*. R.S.Q., chapter A-3.01; and in BC: *College and Institute Act*. [RSBC 1996] CHAPTER 52; *University Act*. [RSBC 1996] CHAPTER 468.

to receive instruction from the postsecondary institutions they attend²⁹ which empowered Quebec's minister of education to defund student associations - and Bill 18 - 2011 *Advanced Education Statutes Amendment Act*³⁰ in British Columbia that prohibits elected student and faculty representatives from serving on university governing bodies. Within a context of weak Canadian jurisprudence on associational activities, this chapter explores possibilities and limitations in advancing student associational security and their activities in order to realize change through their "strength in numbers." It also comments on the opposition to mandatory student union fees, revealing the negative implications of such voluntary student unionism policies in that have emerged in Australia and New Zealand.³¹

Chapter 5 examines concerns about the viability of freedom of speech on Canadian campuses, and student expressive activities in this context. It examines Canadian jurisprudence on expression and dissent in the context of contemporary issues facing students. In particular, the role of non-academic codes of conduct policies is put into question. I will examine both the significance and limitations of the *Pridgen*³² decision, which comments on the obligations of universities in student disciplinary processes. The chapter further considers the role of codes of conduct in imposing regulatory behaviour. It further problematizes the possibility that the language of discrimination and harassment prevention can be co-opted for the purpose of applying

²⁹ *An Act to enable students to receive instruction from the postsecondary institutions they attend* (L.Q., 2012, c. 12 / Laws of Quebec, 2012, chapter 12).

³⁰ *Advanced Education Statutes Amendment Act*, (RSBC 2011 Chapter 7).

³¹ *Higher Education Support Act 2003* (section 19-37). Government of Australia. Online: <<http://www.comlaw.gov.au/Series/C2004A01234>>; and, *Education (Freedom of Association) Amendment Act 2011*, Public Act, 2011 No. 80. Government of New Zealand, Date of Assent: September 30, 2011. Online: <<http://www.legislation.govt.nz/act/public/2011/0080/latest/DLM2301302.html>>.

³² *Pridgen v. University of Calgary*, 2012 ABCA 139; *Pridgen v. University of Calgary*, 2010 ABQB 644.

codes of conduct to silence meaningful dialogue, debate and dissent. The chapter additionally examines the intersection between general expressive liberties as a condition for the freedom to learn. It concludes by maintaining that universities have a particular responsibility to denounce and prevent discrimination and eradicate inequality. In part, they must do so by diligently upholding the right of free speech and promoting the campus as a space for debate and critical inquiry. However, their quasi-judicial structures may be ill-equipped to regulate discriminatory behaviour, especially given the reticence of universities to commit to *Charter* freedoms. It further calls for universities to exercise vigilance in preventing powerful interests from suppressing controversial topics on campus.

Students may not enjoy the professional rights and responsibilities related to academic freedom and tenure the same way that instructors require to carry out their duties grounded in peer review and expertise, but they rely on academic freedom in order to learn. If we are to accept that there is a fundamental public function of universities to foster critical thinking and independence of mind, then it is crucial to consider the necessary conditions to foster learning. Student political and academic participation in the university is critical for the advancement of knowledge and inquiry - and for broader social and political change. They enrich the campus environment, paving the way for social and environmental justice – by calling for anti-sweatshop policies, responsible investment practices, child care, bottled water bans, and safer spaces for students and faculty of various gender expressions and sexual identities. Their political, social, religious, athletic, and cultural activities all contribute to a vibrant academic community. Students have also contributed to transformations in curriculum and academic programming, university governance activities, and other scholarly activities. This thesis examines these activities in relation to legislative, judicial, and quasi-judicial frameworks interacting with student campus activities.

This thesis concludes by asserting that Canadian universities and colleges have a fundamental purpose to supporting public knowledge for the public good. As there is a symbiotic relationship between teaching and learning, both faculty and students require protections to support their roles in this public function. For students, the maintenance of robust protections for associating and expression will foster their role-related rights to learn. Moving forward from this exploration of the freedom to teach and the freedom to learn, there are many possibilities for subsequent debates on what academic, legislative, and statutory provisions can foster a robust and symbiotic academic freedom in Canada. Students will first and foremost have to rely on their creative and collective visions, which may at times, find their voices on the streets; but they will also navigate in the courts and through university structures to challenge against other interests encroaching into institutions of higher education.

Chapter 2: Foundations and Principles of Academic Freedom and Student Rights

Academic freedom, both as a concept and in practice, is subject to much discussion and debate. It affects student learning conditions, but students themselves may not be entitled to academic freedom protections as the concept is most generally accepted as a scholarly professional right. "Academic freedom" is broadly defined as an academic's right to teach, research, publish, critique, and participate in university governance - free of reprisal or interference.³³ Less frequently, definitions of academic freedom are considered more broadly, including students' right to learn.³⁴ University administrators have advocated a different approach, emphasizing institutional autonomy and external deference to university decision making as the cornerstone of academic freedom.³⁵ Some writers argue that academic freedom applies to the broad scholarly community – faculty and students alike. Other scholars reject that academic freedom applies to students. However, there is little controversy that quality student learning conditions require highly safeguarded academic freedom. There is also broad agreement that students must enjoy robust civil liberties on campus in order to reach the pedagogical goals of independent and critical thinking. Thus do students have either civil liberties or academic freedom entitlements on Canadian campuses? I will initiate consideration of this question by reviewing the social and legal history of the development of scholarly and campus freedoms for both faculty and students in Canada and the United States.

³³ Michiel Horn, *Academic Freedom in Canada: A History* (University of Toronto Press: Toronto, 1998); Finkin and Post, 2009.

³⁴ Finkin and Post, 2009.

³⁵ Horn, 1998.

Few would argue against the notion that academic freedom is a professional right. In 1997, UNESCO adopted an extensive recommendation on the "status of higher education teaching personnel," recognizing the "right to education, teaching, and research" and which includes broad support for academic freedom, civil rights, right to publication, and the international exchange of information amongst higher education personnel. Indeed, the academy requires rigorous standards in order to fulfill its objectives. However, the academy also needs to consider the impact of the politics of academic freedom on student conditions, inside and outside the classroom.

This chapter reveals that students in North America have contributed to the discourse and defense of academic freedom – defending professors facing persecution, calling for democratic university governance, defending free speech and other civil rights and liberties, and encouraging accessible and diverse education.³⁶ However, at times notions of students' have been perceived to compete with the academic freedom of instructors, manifesting in debates around student evaluations, indoctrination or "intellectual diversity". At other times, student rights have competed with each other. In part, these conflicts can be understood within the context of a rising ethos of individualism³⁷ and "legalization"³⁸ of the campus. However, these conflicting interactions can also be attributed to an increasingly diversifying student body in various capacities. Many theorists have noted that power relations can affect the practice of knowledge and

³⁶ Horn, 1998, 1999; Anthony J. Nocella, Steven Best and Peter McLaren, eds, *Academic Repression: Reflections from the Academic Industrial Complex* (Edinburgh: AK Press, 2010); Jim Downs and Jennifer Manion, eds, *Taking Back The Academy!: History Of Activism, History As Activism* (London: Routledge, 2004).

³⁷ Henry A. Giroux and Susan Searls Giroux, *Take Back Higher Education: Race, Youth, and the Crisis of Democracy in the Post-Civil Rights Era*. (New York: Palgrave MacMillan, 2004).

³⁸ Amy Gadjia, *The Trials of Academe: The New Era of Campus Litigation*. (Cambridge: Harvard University Press, 2009).

academic freedom in the academy thereby inviting inquiry into such manifestations.³⁹ These practices of power sometimes influence the parameters of and access to academic freedom protection.⁴⁰

Setting students apart from the struggle for academic freedom risks overlooking the influence students have made on campuses. Many transformations in higher education have been the result of vocal, and even sometimes irreverent, student activism - in the classroom, in their extracurricular activities, and off campus throughout society and politics. In this chapter, I review the literature that chronicles the development of and debates on academic freedom in the United States and Canada, also showing how these debates have intersected with student activism within and outside of the classroom. Beginning by revisiting the origins of the concept of academic freedom, this review attempts to re-establish a concept of "freedom to learn" as a component of academic freedom in North America. Next, I review the influence and intersection of student activism with both faculty activism and other transformations in the academy. In closing, I identify threats and challenges to academic freedom, exploring its parameters in the context of student pedagogical growth.

Historical Roots of Academic Freedom - Freedom to Teach and Learn

The North American origins of academic freedom trace back to Enlightenment Germany, where academic freedom was defined in a dialectical relationship between teaching and learning.⁴¹ In *For the Common Good: Principles of American Academic*

³⁹ Dorothy E. Smith, 2000; Scott, 2009.

⁴⁰ Edward W. Said, "Identity, Authority, and Freedom: The Potentate and the Traveler" (1994) 21:3 *boundary 2* 1-18 Online: <<http://www.jstor.org/stable/303599>>; Sheila Slaughter and Larry Leslie, *Academic Capitalism: Politics, Policies, and the Entrepreneurial University* (Baltimore: John Hopkins University Press, 1997); Dorothy E. Smith, 2000; Scott, 2009.

⁴¹ Horn, 1998; Finkin and Post, 2009.

Freedom, Finkin and Post (2009) recount that in 1811, Prussian philosopher Johann Gottlieb Fichte introduced the concept of "*Akademische Freiheit*" or "academic freedom". This concept, along with the notion of *Wissenschaft* (roughly translated as 'science'), shaped ideals of institutional autonomy and freedom of research and teaching in American institutions. In the German tradition, academic freedom required both *Lehrfreiheit* – freedom to teach – and *Lernfreiheit* – freedom to learn. In 1832, *Akademische Lehrfreiheit* and *Lernfreiheit* were enshrined in Bavarian canonical law. In its German origins, this freedom to learn referred mainly to the right of students to choose their own courses. It recognized that once students reached university, they were independent enough to determine the direction of their education. In other words, university students were at an age and maturity where they could exercise a level of autonomy and independence in the selection of their courses, extracurricular activities, and even residency, in contrast with the *in loco parentis* model of primary and secondary education where the institution assumed a degree of parental guardianship and control over curriculum.⁴² German universities focused solely on the academic growth of their students and kept out of providing housing or residency or monitoring their private behaviour.⁴³ Finkin and Post recount that *Lehrfreiheit*, the freedom to teach, heavily influenced the American evolution of academic freedom, while *Lernfreiheit*, the freedom to learn, did not carry over in the same way as students were considered to be under the institution's guardianship in their parents' absence. As we explore later, this *in loco parentis* model will continue to affect the approach to student relations in North American institutions.

⁴² Walter P. Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America" (1988) 66 Tex L Rev 1265.

⁴³ *Ibid.*

Academic Freedom in the United States: For the Public Good or an Individual Right?

The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable.⁴⁴

While the German concept of academic freedom influenced the foundations of academic freedom in the United States, Finkin and Post argue that the governing structure of American universities was substantively different than the collegial faculty-led governing structure in German universities:

Universities in the United States were not under the independent control of faculty. They were instead governed by a lay board chosen by a private proprietor...therefore, faculty were considered employees of an institution that was controlled by a non-professional governing board.⁴⁵

Thus, American universities originally lacked a collegial structure. Scholars were expected to answer to private trustees, rather than to each other, or to the public. Hence, a faculty-led collegial structure needed to be developed within the constraints of a private model.

Finkin and Post explain that academic freedom predominantly developed in two distinct, yet interrelated, manners in the United States. On the one hand, it evolved as a professional right, encompassing the rights and responsibilities required for the scholarly community in the context of their public duty. But it also emerged as an individual expressive right protected for public employees under the 1st Amendment free speech clause of the U.S. Constitution.⁴⁶ This second manner has provided a legal avenue for

⁴⁴ AAUP 1915 Declaration of Principles on Academic Freedom and Academic Tenure. Online: American Association of University Professors
<<http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm>>

⁴⁵ Finkin and Post, 2009, p. 24.

⁴⁶ See Joan W. Scott, "Knowledge, Power, and Academic Freedom" (2009) 26:2 *Social Research* 451-480.

individual academics to pursue when academic freedom was not upheld within the academy.

As a professional right, the notion of academic freedom adopted by the Association of American University Professors' (AAUP) 1915 Declaration of Principles on Academic Freedom borrowed from the German conceptions of *Lehrfreiheit* and *Lernfreiheit*. The 1915 Declaration explicitly limited its definition to academic professionals, despite acknowledgement in the preamble of *Lernfreiheit* – the freedom to learn. There were four elements of American *Lehrfreiheit* academic freedom in the 1915 Declaration: research and publication, teaching, intramural speech, and extramural speech. Finkin and Post argue that the Declaration articulates the professor's scholarly rights as an appointee of the university, who is accountable to the public, not merely to the university. In 1940, AAUP adopted the *1940 Statement of Principles of Academic Freedom and Tenure*, a document negotiated with the Association of American Colleges, now the seminal document for academic freedom in the United States. Unfortunately, the *Statement* removes extramural expression and is ultimately a more generic document than the 1915 *Declaration*. Finkin and Post point firmly to the *Declaration* as the more ideal and broadened definition of academic freedom.

Ultimately, academic freedom is necessary for the common good, according to Finkin and Post. It is firmly grounded in the scholar's rights and responsibilities to fulfill the purposes of higher education, including creating new knowledge and fostering student independence of thought. In order to ensure academic freedom serves the common good, Finkin and Post contend that it requires public support to preserve professional autonomy and foster the pedagogical goal of "mature independence of mind" in students.

Power, Neutrality and the Responsibility of Academic Freedom

Despite longstanding recognition of academic freedom through eloquent statements and declarations, many scholars have detailed the political, economic, and other forms of power relations that interfere with academic freedom.⁴⁷ According to Scott (2009), power struggles exist between conceptualizing academic freedom as a theory of faculty rights and as a practice that defends them. These tensions, she argues, manifest in power struggles among faculty, administrators, and boards of trustees, which complicate negotiations of academic freedom. She notes that “academic freedom...demands extraordinary restraint from those used to exercising power based on judgments they themselves make and outcomes they project and pay for.”⁴⁸ While academic freedom intends to mitigate conflicts between power and knowledge, exercising restraint can be difficult because the university is not immune to power relations – namely the tensions between corporate power and academic inquiry. She further maintains that university trustees have a duty to make the protection of academic freedom a priority. She writes: “If the function of the university is critical thinking, it is the job of the trustees to protect it...Indeed, they must use their power to insulate free inquiry from powerful interests that might corrupt it.”⁴⁹ Scott further observes that these power relations are so deep-rooted that scholarly peers may perpetrate regulatory acts against each other that ultimately suppress academic freedom. One avenue is through their activities on peer disciplinary committees where while they, on the one hand, affirm

⁴⁷ Ellen Schrecker, *No Ivory Tower: McCarthyism and the Universities* (New York: Oxford University Press, 1986); Robert O’Neil, *Academic Freedom in the Wired World: Political Extremism, Corporate Power, and the University* (Cambridge: Harvard University Press, 2008); and, Joan W. Scott, “Knowledge, Power, and Academic Freedom” (2009) 26:2 *Social Research* 451-480.

⁴⁸ Scott 2009, p. 459.

⁴⁹ Scott 2009, p. 457.

academic freedom protections, but also participate in the suppression of the true exercise of academic freedom through peer regulation. Thus, while peer review is a cornerstone to collegiality in its ideal form, it is immune to neither external pressures nor the internalization of those power relations. These conflicts, she argues, often manifest when standards of objectivity, disciplinary politics, and academic responsibility obfuscate the meaning of academic freedom. Scott highlights charges made against Ward Churchill and Angela Davis, two professors who were outspoken outside the academy on various political matters, were subsequently fired on the basis of questions about their scholarly integrity.⁵⁰

To further illustrate the intersection between academic freedom and interests that attempt to regulate it, Scott points to contemporary challenges in Middle East scholarship as an avenue where power, knowledge, and academic freedom face continued tension and critiques on the presentation of “balanced” or “neutral” scholarship. She is not the only scholar to critique the politics of knowledge and power in relation to Middle East scholarship. Canadian scholars, such as Thompson (2011) and Masri (2011), similarly argue that a duty of neutrality is not an obligation associated with academic freedom. Thompson distinguishes the responsibility of the university to be neutral from the right of scholars to be non-neutral in the formulation of their theories, ideas, and arguments:

The role of the university as a corporate community is necessarily different from that of the individual professor-the university must be neutral so as to protect academic freedom of academics.⁵¹

Thompson further argues that ideologies play a significant role in academic debate and inquiry making it necessary for scholars to engage in ideological arguments. He explains

⁵⁰ Scott 2009.

⁵¹ Jon Thompson, *No Debate: The Israel Lobby and Free Speech at Canadian Universities* (Halifax: Lorimer, 2011) 221.

that “[i]deologies are common in scholarship and far from necessarily tarnishing it, an ideological perspective can be fundamental to progress in a field.”⁵² These relations of power in academia are instructive of the interplay of power and conflict outside of the ivory tower, according to Masri (2011). And this power interplay affects what types of scholarly activities are targeted under the guise of maintaining neutrality or shielding bias:

In practice, academic freedom, which promises protection to all academics, seems to apply less to those who need it more. The level of protection in fact varies according to the power that interested parties wield and the identities at play. The vulnerability of scholars is usually a reflection of the current power dynamics in the nonacademic world.⁵³

Thus, the question of how academic freedom interacts with contemporary politics and power surface in critical questioning of the academy. Dorothy E. Smith (2000) also critiques how universities, as regulatory institutions, are susceptible to “deploying the discourse of academic freedom to repress”⁵⁴ particularly when shielding against criticisms of racism or sexism.

In spite of power relations that influence academic scholarship, both internally and externally, Scott argues that scholars must take responsibility to protect academic freedom. As a professional responsibility, she maintains that, even though administrators have a duty to safeguard academic freedom, scholars need to exercise responsibility to safeguard the integrity of academic freedom, particularly by refuting certain ideas and arguments. In this context, while professors may not have the duty to be neutral, they do have the responsibility to challenge, dispute, and debate the validity and standard of

⁵² Thompson, 2011, p 221.

⁵³ Mazen Masri, “A Tale of Two Conferences: On Power, Identity, and Academic Freedom” (2011) 2 *AAUP Journal of Academic Freedom* 24.

⁵⁴ Dorothy E. Smith 2000, p. 154.

each other's ideas, methods, and research.⁵⁵ Scott concludes that universities will need to continue to struggle among power relations to safeguard critical thinking in scholarship. Dorothy E. Smith further argues that the university must maintain a serious commitment to dialogue and speech in order to move beyond its own institutional forms of repression. For Dorothy Smith, this includes a dialogue of the criticisms "*originating in students' experiences of departmental practices*."⁵⁶ Thus, while power relations are not likely to ever disappear from academia, open debate and dialogue is necessary for the pursuit of the ideals in academic freedom.

Academic Freedom as a Narrow Responsibility

Some American scholars adopt more narrow approaches to academic freedom, arguing that academic freedom requires that scholars respect strict duties of neutrality and objectivity, particularly to avoid engaging in indoctrination. From this approach, the removal of ideology and politics from teaching and research is the only way to prevent indoctrination and bias – a particular fixation of academic freedom debates in the U.S. In *Save the World on Your Own Time*, Stanley Fish (2008) asserts that the relationship between academic freedom and free speech is very limited and narrow. He identifies that his position of academic freedom is "narrowly professional rather than philosophical."⁵⁷ Higher education, Fish maintains, has only two specific purposes: to introduce students to bodies of knowledge; and, to equip them with analytical skills to accompany their acquired knowledge. As the university is a place for teaching and research, politics have no place in the academy. The role of academicizing, he argues, means detaching the ideas from reality. In contrast to Finkin and Post (2009), Fish

⁵⁵ Scott 2009.

⁵⁶ Dorothy E. Smith 2000, p. 154. [emphasis in original]

⁵⁷ Fish, 2008, p. 16.

argues that the goal of higher education is not to foster broad-based critical thinking or knowledge for the common good. Rather, it is entirely pragmatic in its purpose. There is a dichotomy between good instructors, according to Fish. There are those who teach through planned lessons, and office hours and provide academic advising without moral or political suasion, and those professors who engage in political advocacy. He argues that:

The unfettered expression of ideas is a cornerstone of liberal democracy; it is a prime political value. It is not, however, an academic value, and if we come to regard it as our primary responsibility, we will default on the responsibilities assigned us and come to be what no one pays us to be – political agents engaged in political advocacy.⁵⁸

Fish opposes the notion that academic freedom is correlated with free speech. He argues that academics have the right to study and interrogate freely, but that they do not have the right to exert political influence or indoctrination. Fish certainly does not oppose political engagement of professors, but argues that such activities must occur in their exclusively private capacities. He argues: "After hours, on their own time, when they write letters to the editor or speak at campus rallies, they can be as vocal as they like about anything and everything."⁵⁹ Despite Fish's assertion that academic freedom is distinct from free speech, the next section demonstrates how the American courts have a long history of revealing their intersecting relationship, for better or for worse.

Academic Freedom in the Law in the US: Free Speech and Academic Freedom

The intersection between academic freedom and free speech preoccupies a great deal of academic freedom theorizing, particularly in the United States, as does the role of political speech or what is sometimes considered indoctrination. In fact discussions of academic freedom have become so pervasive that, in a recent lecture

⁵⁸ Fish, 2008, p. 20.

⁵⁹ Fish, 2008, p. 29.

series, Stanley Fish introduced a new discipline which he coined "Academic Freedom Studies."⁶⁰ Robert O'Neil (2008)⁶¹ accounts for the changing landscape of academic freedom rights in the United States prompted by various social, political and technological shifts. He argues that the academic community needed a collective commitment to academic freedom which mainly flourished through the work of faculty organizations and the AAUP. Various activities, including the utilization of the AAUP's censure process, collective bargaining, as well as litigation have shaped the "metamorphosis" of the principles and processes of academic freedom in the United States. While contractual commitments and collective agreements (where they exist) and tenure have been critical for protecting academic freedom, universities have at times been able to break those commitments. Thus, O'Neil argues that it has been also important to defend academic freedom through litigation in the courts.

According to O'Neil, constitutional recognition for academic freedom first appeared in the courts when a Tennessee high school teacher's right to teach evolution was denied in 1927.⁶² It was not until the 1960s that the U.S. Supreme Court would determine that government prohibition of teaching evolution was unconstitutional.⁶³ This prompted recognition that not only "professors" had academic freedom rights, but high school teachers and college instructors must also be protected from state interference. However, it also initiated the limiting of constitutional protection to public or state-supported educational institutions.

⁶⁰ Stanley Fish, "Academic Freedom" A series of lectures by Stanley Fish, (April 10-12, 2012), Campbell Lecture Series, Rice University, Houston, Texas. Online: <http://edtech.rice.edu/www/?option=com_iwebcast&action=details&event=2691>.

⁶¹ Robert O'Neil, *Academic Freedom in the Wired World: Political Extremism, Corporate Power, and the University* (Cambridge: Harvard University Press, 2008).

⁶² *Scope v. State*, 154 Tenn. 105, 289 S. W. 363 (1927).

⁶³ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

A decade earlier, the Cold War of the 1950s represented a historically chilling time for academics in the United States, and in general, for many who were targeted for their non-academic political activities, particularly those with suspected affiliation to communism.⁶⁴ Professors could be terminated for their political affiliation and loyalty oaths and bans on outside speakers posed serious threats to freedom of speech.⁶⁵ As a response to McCarthyism, coupled with general civil rights activism, free speech activism became a central mobilizing issue. Among the more prominent were Students for a Democratic Society and the Berkeley Free Speech Movement. During the McCarthy period, even the National Student Association was taken over by the Central Intelligence Agency (CIA), regaining relative independence by the mid-1960s.⁶⁶

O'Neil (2008) also recounts various landmark rulings that both broadened the concept of academic freedom and set limitations on its application in the United States. In part as a response to McCarthyism, the subsequent decades offered broad interpretations in academic freedom jurisprudence. Some of the notable earlier cases defined the special role of the classroom and the necessity of academic freedom for fostering independent and critical thought. Many decisions applied these 1st Amendment derived academic freedom rights to primary and secondary school teachers and students as well. The 1957 decision in *Sweezy*, for example, affirmed the importance of free inquiry for both instructors and students in the classroom: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and

⁶⁴ O'Neil 2008; Schrecker, 1986.

⁶⁵ Ellen Schrecker, *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom and the End of the American University* (New York: The New Press, 2010).

⁶⁶ Angus Johnston. "A Brief History of the United States Student Association," (15 July 2010), *Student Activism*
Online: <<http://studentactivism.net/2010/07/15/a-brief-history-of-the-united-states-student-association/>>.

understanding; otherwise our civilization will stagnate and die."⁶⁷ In 1975, the California Supreme Court ruled on the importance of the free exchange of ideas among instructors and students for democracy:

The crucible of new thought is the university classroom; the campus is the sacred ground of free discussion. Once we expose the teacher or the student to possible future prosecution for the ideas he may express, we forfeit the security that nourishes change and advancement. The censorship of totalitarian regimes that so often condemns developments in art, science and politics is but a step removed from the inchoate of free discussion in the university; such intrusion stifles creativity and to a large degree shackles democracy.⁶⁸

While for several decades Supreme Court recognition of Bill of Rights-based speech recognized protections for public sector employees, including professors, the strength of these protections changed at the turn of the 21st century. In concurrence with many scholars, O'Neil identifies that a change occurred in the academic climate after September 11, 2001 when professors experienced more retaliation for speaking inside and outside the classroom on the terrorist attacks.⁶⁹

But protecting academic freedom as a subset of the free speech clause later led to its partial demise in the United States. In *Garcetti v. Ceballos* (2006), the U.S. Supreme Court ruled that speech made as a public employee, rather than as a private citizen, was not speech protected under the First Amendment.⁷⁰ O'Neil explains the implications of this decision for the academy:

The implications of the *Ceballos* ruling for academic freedom are deeply troubling...For one, where it is clear that a state university professor speaks with regard to his or her assigned academic specialty, the scope of constitutional protection now varies inversely with the proximity of scope of that subject to the topic of the contentious statement... The scholar who discusses a matter that is quite remote from his or her academic discipline still seems to enjoy First Amendment protection, whereas the professor who evokes

⁶⁷ *Sweezy v. New Hampshire* - 354 U.S. 234 (1957) at para 250.

⁶⁸ *White v. Davis*, 13 Cal. 3d. (1975) at para 771.

⁶⁹ O'Neil, 2008; see also James Turk and Allan Manson (eds), *Free Speech in Fearful Times: After 9/11 in Canada, the U.S., Australia & Europe* (Toronto: Lorimer, 2007).

⁷⁰ "The Constitution of the United States," Amendment 1.

controversy while addressing the field in which he or she is an expert apparently forfeits such protection because such statements fall within that scholar's 'official duties'.⁷¹

Thus, while the free speech clause only ever protected the academic freedom of scholars in public institutions, *Garcetti* retracted even their protection. Delfattore (2011) states, in moving forward from *Garcetti*, efforts to protect and defend academic freedom should be fought for within the academic community instead of the courts.

As the 2006 Supreme Court decision in *Garcetti v. Ceballos* continues to reverberate in academe, the best way for faculty members to defend their academic freedom is not through the courts but through clear university policies.⁷²

Former AAUP president, Carey Nelson, asserts that in the face of this Supreme Court decision, it is even more crucial that academic freedom recognition in university policies be secured through unionization and collective agreements in order to shield it from any further legal or political attacks.⁷³

O'Neil observes that the 21st century represents both the "best of times and the worst of times" for academic freedom. He claims that serious threats to academic freedom continue to persist, mainly coming from pressures from private companies and donors to manipulate research, political extremism within and outside the academy, and the upsurge of the individualization of student rights and other external groups attempting to control curricula. Several scholars have expanded on how commercialization agendas threaten academic freedom and the learning environment more generally.⁷⁴ O'Neil argues that, unlike the significant government interference

⁷¹ O'Neil, 2008, p. 59.

⁷² Joan Delfattore, "Defending Academic Freedom in the Age of *Garcetti*", (2001) *Academe*. January-February 2011. Online:
<<http://www.aaup.org/AAUP/pubsres/academe/2011/JF/Feat/delf.htm>>

⁷³ Cary Nelson, *No University is an Island: Saving Academic Freedom* (New York: New York University Press, 2010).

⁷⁴ Schrecker, 2010; Jennifer Washburn, *University, Inc.: The Corporate Corruption of Higher Education*. (New York: Basic Books, 2005); Henry A. Giroux, "Academic Freedom Under Fire: The Case for Critical Pedagogy" (2006) 33:4 *College Literature* 1-42.

during McCarthyism, many of the more contemporary threats are mainly driven by external non-governmental bodies, such as private companies and private organizations attempting to advance social, political and economic interests. With the trend of corporatization on campuses, O'Neil notes that precarious working conditions further exacerbated threats to collegiality and academic freedom.⁷⁵

Commercialization and Academic Freedom

Several scholars have articulated concerns about the threats to academic freedom in the transforming economic landscape of higher education, marked by corporate influence, technological transformations, and the casualization of academic labour. As industry partners and private donors are increasingly expecting to formally participate in and influence research, curriculum, governance, and other elements of the academy through internal avenues. Jennifer Washburn, in *University, Inc.: The Corporate Corruption of Higher Education*, chronicles the increasing involvement of private industry in North American universities. She argues that industry-university collaborations bring several perils to academic culture including: the erosion of a public domain of knowledge and an open scientific culture, the undermining of academic rigour and instruction, and producing a "chilly climate." Washburn explains:

When universities become interested parties, with financial profits at stake...they begin to behave like any other business enterprise. In the intellectual property sphere...schools all too frequently put their financial concerns ahead of the public interest in advancing science and innovation...In the classroom, deans and provosts are concerned less with the quality of instruction than with how much grant money their professors bring in.⁷⁶

Authors critical of this privatization creep in higher education argue that "market model" principles in education are incongruent with academic freedom principles by encouraging the suppression of research results, proprietary access to knowledge, and

⁷⁵ Washburn, 2005; Schrecker, 2010.

⁷⁶ Washburn, 2005, p. 227.

forms of misconduct to protect commercial interests. Washburn explains that students are affected by this climate in that private interests can either delay or even deter the completion of their theses or dissertations. Intellectual property disputes between students and faculty are particularly challenging for students whose protections are weak, notes Washburn. Further to this, Schrecker (2010)⁷⁷ argues that the corporatization of the university has exacerbated funding inequalities among the disciplines where the applied sciences are able to receive more funding so long as they skew their projects for corporate interests while the humanities and social sciences have more trouble achieving grants. Schrecker also identifies that universities were urged to reform the university model of collegial governance which was frowned upon by the private sector for being "simply too slow, too inefficient."⁷⁸ The shift towards a corporate model of education, Schrecker argues, led to faculty loss of control over teaching, research, and governance. It further led to the trend towards a more flexible or casual academic labour force, a professorial tier much more vulnerable than tenured faculty to academic freedom violations. Schrecker warns that shifting the academy to service private industry "not only would stunt the careers and futures of students and teachers but also would undermine the very idea of the university as a place for intellectual growth and meaningful scholarship."⁷⁹

⁷⁷ Ellen Schrecker, *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom and the End of the American University* (New York: The New Press, 2010).

⁷⁸ Schrecker, 2010, p. 180.

⁷⁹ Schrecker, 2010, p. 233.

Within the context of this increasingly corporatized climate of higher education, and setbacks in the courts, Nelson (2010)⁸⁰ and Delfattore (2011)⁸¹ argue that the academic community should retreat from fighting for academic freedom in the courts, seeking instead to reinforce academic freedom within the scholarly community and namely through university policies and collective agreements. Amy Gadjia (2009)⁸² argues against what she identifies as an overly litigious direction of managing conflicts on U.S. campuses, arguing that the “creeping legalization of academic life” threatens academic freedom. In *The Trials of Academe: The New Era of Campus Litigation*, Gadjia claims that various pressures, such as commercialization, the proliferation of civil rights laws, and preoccupation with institutional reputations in higher education, are driving disputes increasingly to the courts. She further observes that the courts have demonstrated a growing willingness to arbitrate internal disputes of the academy. In addition to the “realignment of priorities and incentives for the ‘hoarding and selling’ of knowledge,”⁸³ the erosion of tenure, and greater public oversight of universities, Gadjia argues that contractual agreements for the delivery of educational services has also proliferated. She argues that the courts are ill-equipped to uphold academic freedom while “micromanaging” university administrative activities such as course content, academic autonomy, exam policies and peer review. She proposes that, while it is unlikely to entirely reverse the trend of litigiousness, institutions ought to aim to restore a sense of community to avoid the continuing spike in litigation on campus. She further

⁸⁰ Cary Nelson, *No University is an Island: Saving Academic Freedom* (New York: New York University Press, 2010).

⁸¹ Joan Delfattore, “Defending Academic Freedom in the Age of Garcetti”, (Jan-Feb 2001) *Academe Online*: Association of American University Professors
<<http://www.aaup.org/AAUP/pubsres/academe/2011/JF/Feat/delf.htm>>.

⁸² Amy Gadjia, *The Trials of Academe: The New Era of Campus Litigation* (Cambridge: Harvard University Press, 2009).

⁸³ Gadjia, 2009, p. 234.

argues that American courts ought to work to restore a balance of deference to university decisions in order to minimize the impact on academic decision-making. For example, she states that "courts must...have the capacity to intervene in appropriate cases of discrimination, intellectual suppression, breach of contract, or wrongful personal injury, but under a doctrinal formulation that limits the intervention to cases where the expected benefits outweigh the risks."⁸⁴

Students and Academic Freedom in the United States

Students have been both influential in and influenced by the evolution of academic freedom rights and their associated threats in the United States. Students have also been involved in both the defense of and affronts to professorial teaching conditions.⁸⁵ In the 1960s, students in the U.S. began to articulate the potential for considering their own rights in the academy or "student academic freedom". These discussions have been controversial – sometimes in concert with the goals of professors – and other times directly at odds.

Student activism has a long history in the United States. The 1930s, for example, were marked with a spike in student mobilizing, particularly focusing on anti-militarism after World War I.⁸⁶ However, it has been broadly documented that after the Cold War and among an increasingly diverse student demographic, American campuses were met

⁸⁴ Gadja, 2009, p. 248.

⁸⁵ O'Neil, 2008.

⁸⁶ Schrecker, 1986.

with growing radicalism, contributing to monumental historical socio-political transformations in the United States.⁸⁷

While many academic freedom scholars have given little attention to the role of students and academic freedom on campus, some authors have maintained that students have been the impetus behind advancing academic freedom rights, especially through their activism in the 1960s. Nocella et al (2010), in *Academic Repression: Reflections from the Academic Industrial Complex*⁸⁸ argue that it was largely the irreverence encapsulated by student organizing and their willingness to engage in direct action led to social change on U.S. campuses:

It is important to stress that the ground work for advancing and protecting academic freedom [in the US] was laid down by students, not professors – by the youth, the counterculture, and the New Left, none of whom had titles, positions, reputations, retirement packages, sponsors, bosses...With nothing to lose but their library privileges, students didn't just *spea*k truth to power, they *used power* to overturn established 'truth'. They fought for free speech and against repression, and yet were repressed in a far more fundamental and brutal way – not by politicians, administrators, and bureaucrats legislating their discourse, but rather by cops attacking, beating, gassing, and jailing them.⁸⁹

Students were organizing in communities and regions throughout the country, working together on various social and political interests. Among the larger groups were the following: the Berkeley Free Speech Movement (FSM) at University of California Berkeley which protested primarily against bans on political activity on campus;⁹⁰ the Student Nonviolent Coordinating Committee (SNCC) which originated as a student led

⁸⁷ Schrecker, 2010; Anthony J. Nocella, Steven Best and Peter McLaren, eds. *Academic Repression: Reflections from the Academic Industrial Complex*. (Edinburgh: AK Press, 2010); Jim Downs and Jennifer Manion, eds, *Taking Back The Academy!: History Of Activism, History As Activism*. (London: Routledge, 2004).

⁸⁸ Anthony J. Nocella, Steven Best and Peter McLaren, eds, "Introduction", *Academic Repression: Reflections from the Academic Industrial Complex*. (Edinburgh: AK Press, 2010) 13-89.

⁸⁹ Nocella et al, 2010, p.39.

⁹⁰ Robert Cohen and Reginald E. Zelnik, eds, *The Free Speech Movement: Reflections on Berkeley in the 1960s*, (Berkeley: University of California Press, 2002).

civil rights group who largely engaged in direct action to challenge segregation laws in the South;⁹¹ Students for a Democratic Society (SDS) which emerged to oppose Cold War policy, racial discrimination and income inequality encouraging socialist democratic positions through non-violent civil disobedience; and elements of the Black Power Movement and youth communist groups,⁹² such as the Che Lumumba group, a youth communist group which attempted to advance economic equality and civil rights. Students for a Democratic Society was the largest and most organized student organization, which not only worked closely with SNCC, but also collaborated with student groups internationally. Klimke (2004)⁹³ describes how, through regular exchanges between students in the U.S. and Germany, students were adopting similar “politics of strategic provocation”⁹⁴ and coordinating resistance against “free world policies of their own countries in the cold war”.⁹⁵ The formal body representing students nationally, the United States National Student Association (NSA) was secretly funded by the Central Intelligence Agency from the early 1950s until 1967, where efforts were made to prevent the organization from playing too supportive a role for progressive positions or working too closely with Students for a Democratic Society and the left-leaning international coalition of student group, the International Union of Students.⁹⁶

⁹¹ Anthony J. Nocella, Steven Best and Peter McLaren, eds, “Introduction”, *Academic Repression: Reflections from the Academic Industrial Complex* (Edinburgh: AK Press, 2010) 13-89.

⁹² *Ibid.*

⁹³ Martin Klimke, “Between Berlin and Berkeley, Frankfurt and San Francisco: The Student Movements of the 1960s in Transatlantic Perspective,” Jim Downs and Jennifer Manion eds, *Taking Back the Academy! History of Activism, History as Activism*. (London: Routledge, 2004) 35-54.

⁹⁴ Klimke, 2004, p. 39.

⁹⁵ Klimke, 2004, p. 48.

⁹⁶ Phil Agee Jr, “CIA Infiltration of Student Groups: The National Student Association Scandal” (1991) Fall 1991 Campus Watch 12-13.

Despite this covert involvement of the government in the national student organization, student organizing continued to flourish through the other grassroots movements, marking historical advances in both academic and non-academic activities at this time.

In the face of large and small protests, clashes between students and police, and growing diversity of the student body, students and the public drew attention to student rights. Free speech, civil rights, evaluating their courses and professors, and avoiding the military draft were among some of the issues at the forefront. During the fifties and sixties, discussions emerged on the extent to which students have academic freedom and constitutional protection on American campuses.⁹⁷ Occasionally, the U.S. courts upheld the constitutional right of students to inquire and to academic freedom.⁹⁸ As previously quoted, the *Sweezy* (1957) decision dramatically asserted:

Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁹⁹

In a case reviewing the activities of the House of Un-American Activities on American campuses, the U.S. Supreme Court recognized "academic teaching-freedom and its corollary learning-freedom" as "essential to the well-being of the nation."¹⁰⁰ The Supreme Court again asserted national commitment to broad academic freedom in *Keyishian* (1967):

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."¹⁰¹

⁹⁷ William W. Val Alstyne, "The Judicial Trend Toward Student Academic Freedom" (1968) XX, *University of Florida Law Review*, 290-305.

⁹⁸ *Barenblatt v. United States*, 360 U.S. 109 (1959); *Baggett v. Bullitt*, 377 U.S. 360, 366 n.5 (1964); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

⁹⁹ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) at para 250.

¹⁰⁰ *Barenblatt v. United States*, 360 U.S. 109 (1959) at para 112.

¹⁰¹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) at para 603.

Additionally, scholars, in part reacting to the damage imparted by McCarthyism on the academy, refuted the belief that institutional autonomy could justify institutions exempting themselves from constitutional liberties in the name of academic freedom. In 1963, political science professor Phillip Monypenny argued against this notion:

The parallels of constitutional liberties which should exist for students on campuses are not easy for all administrations to accept, since the view is still strong, even in public institutions, that educational institutions are essentially proprietary enterprises whose owners and managers have the right to determine what to do with their property and whose good name is bound up with the uses to which it may be put.¹⁰²

Thus, on the heels of several court decisions asserting civil liberties on campuses, greater scholarly attention was drawn to the discretion exercised by university administrations. Additionally, broad mobilizing leading to transformation in university policies, curriculum, and extra-curricular activities, created opportunity for the campus community to formally revisit how academic freedom touched upon student campus activities. At a national scale, many groups collaborated on a document outlining the principles of student rights. Though very rarely referenced by contemporary scholars, the 1967 *Joint Statement on Rights and Freedoms of Students*¹⁰³ between the AAUP, the National Student Association (NSA), the Association of American Colleges, the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors was adopted. The Joint Statement begins by stating the dialectical student-instructor relationship in academic freedom:

¹⁰² Philip Monypenny, "Toward a Standard for Student Academic Freedom" (Summer 1963) 28:3 Law and Contemporary Problems 628.

¹⁰³ "Joint Statement on Rights and Freedoms of Students," Adopted in 1967 between the American Association of University Professors, the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors. Online: American Association of University Professors <<http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm>>.

Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends on appropriate opportunities and conditions in the classroom, on the campus, and in the larger community.¹⁰⁴

The Joint Statement subsequently elaborates in detail the student rights necessary to protect the freedom to learn, including: access to education; rights in the classroom pertaining to expression, academic evaluation, and disclosure; rights related to student affairs, including freedom of association, inquiry and expression; and, participation in institutional governance; and, off-campus freedoms of students, including rights of citizenship and due process in disciplinary proceedings. However, aside from the recognition in the introduction, the document fails to firmly articulate a position on student academic freedom or *Lernfreiheit* instead focusing on the general liberties of the student.

In the mid-sixties, the NSA would begin to sever financial ties with the CIA, disturbed by the Agency's involvement and control.¹⁰⁵ Thus, the NSA continued to attempt to provide a broad representation of student rights in the United States and engaged with other domestic student groups. As an organization, they were more interested in articulating a notion of student academic freedom than many of the other groups that were more interested in advancing civil rights. However, given the popularity of student organizing which was occurring outside of "student governments", the NSA may not have been in direct contact with the epicentres of student organizing. For example, the NSA critiqued the Berkeley Free Speech Movement (FSM) notably for too narrowly focusing on the pursuit to allow political activities on campus. The FSM's demands to the university included: to allow student groups to engage in advocacy, dues

¹⁰⁴ "Joint Statement on Rights and Freedoms of Students," (adopted in 1967) Online: American Association of University Professors
<<http://www.aaup.org/aaup/pubsres/policydocs/contents/stud-rights.htm>>.

¹⁰⁵ Angus Johnston "A brief history of the NSA and USSA." (Retrieved October 20, 2012) Online:
<<http://www.usstudents.org/about/history/>>.

collection for political student groups, and political organizing on campus – all of which had been prohibited at Berkeley since the 1930s. While the NSA supported these goals, they saw them as connected to the goals for student academic freedom, which was considered as those freedoms to undertake activities in their roles as students, beyond their roles as citizen. NSA representative Roland Liebert wrote in 1965 that “a strong student voice and the spirit of commitment and negotiation marks not the end of academic freedom; it is the source of its recreation.”¹⁰⁶

The parental role (*in loco parentis*) relationship between post-secondary institutions and their enrolled students was not a component of the Enlightenment’s *Akademische Freiheit* but it had been assumed in the elitist private institutions in the United States. However, after the 1960s, it was not ideologically tenable for universities to appear to treat students in such a paternalistic manner. Students in the sixties sought opportunities to provide input into the governance of their institutions, world politics, racism, and even evaluating their instructors, moving beyond the parental role of education.¹⁰⁷ While many of the previously mentioned student activist groups began to wind down in the late 1960s,¹⁰⁸ the following decades realized significant shifts in the landscape of higher education – in terms of student diversity, curriculum provision, and a collegial governance model which included student representation. Thus, beyond political and civic engagement, students played a greater role in framing the academic landscape of higher education institutions. For example, Black Studies programs were

¹⁰⁶ Roland Liebert, *The Berkeley Case: Issues in Student Academic Freedom - A Brief Critique*, (March 1965) Second Edition. University of California.

¹⁰⁷ Schrecker, 1986.

¹⁰⁸ Students for a Democratic Society dissolved in 1969 and much later revived in 2006 and the Student Non-Violent Coordinating Committee slowly dissolved in the 1970s. In 1978, the NSA merged with the National Student Lobby to become the United States Student Association (USSA), which is still in existence today.

introduced onto campuses in the face of the end to segregation laws, Women's Studies programs proliferated, and unionization bolstered the democratic structure of university governance.¹⁰⁹ Hence, the influence from student activism had remarkable effects on both the collegial and curricular structure of universities.

Arthur (2011) argues that the "post-1960s diversification of higher education has been fundamental in reshaping the curriculum that students experience today."¹¹⁰ He further asserts that curricular change, initiated by student activism of the sixties but continuing to contemporary universities, has been prompted by both student agitation and faculty support.

Backlash to Student Radicalism

This growing "student power" of the 1960s did not come without response or backlash from both political and institutional forces. Even though many policies and programs changed as a response to student demands, so too did disciplinary policies and efforts to control or stifle growing radicalism on campuses.¹¹¹ Schrecker argues that conservative intellectuals began to liaise more concertedly with business leaders in order to respond to changes in the academy coming out of the sixties. Furthermore, pressures from the private sector sought to ensure that higher education more directly fuel the "marketplace of ideas" and corporate interests. Federal legislation adopted in 1980, the *Bayh-Dole Act*,¹¹² created new opportunities for private interests on university campuses by permitting universities to patent publicly-funded research discoveries,

¹⁰⁹ Schrecker, 2010.

¹¹⁰ Mikaila Mariel Lemonik Arthur, *Student Activism and Curricular Change in Higher Education*. (Surrey: Ashgate 2011) 12.

¹¹¹ Schrecker, 2010.

¹¹² *The Bayh-Dole Act* (35 USC 200-212) P.L. 96-517, Patent and Trademark Act Amendments of 1980.

introducing “a profit motive directly into the heart of academic life”.¹¹³ Seth (2004) comments: “it is hard to escape the impression that Bayh-Dole has in fact made universities a conduit for converting public money into private profit”.¹¹⁴ By the 1990s, Schrecker (2010) argues that “a highly self-conscious and well-financed campaign to destroy the academic left”¹¹⁵ crept onto the scene of American higher education, one that was closely tied to the corporate sector’s efforts to make the university more open to business and to conservative political groups. This campaign, she argues, included the siphoning of funds to student and faculty-led groups to advance conservative-leaning intellectualism and libertarianism in the academy. In the face of this influence, Schrecker observes the proliferation of “individual rights discourse” conflicts with the broader principles of critical inquiry and independence of thought. For example, she indicates that this can in part be seen by the rise of external efforts to control classroom content and too often under the auspices of “student rights”, such as in the formation of the neo-conservative “Students for Academic Freedom” movement and the encroachment of “Academic bills of rights” in the United States, to be elaborated in this following section.

Students and Academic Freedom in the 21st Century

Several authors have identified that a shift occurred in the academy following September 11, 2001 where growing critique of Middle Eastern scholarship occurred in the United States.¹¹⁶ In part, the terrorist attacks provided a platform for the accusation that “radical” professors were engaging in political indoctrination and to call to eliminate

¹¹³ Washburn 2005, p. 70.

¹¹⁴ Anita Seth, “Unionizing for a More Democratic and Responsive University” Jim Downs and Jennifer Manion, eds, *Taking Back the Academy! History of Activism, History as Activism*. (London: Routledge, 2004) 59.

¹¹⁵ Schrecker, 2010, p. 100.

¹¹⁶ O’Neil 2008; Nocella et al, 2010; Scott 2009, Giroux and Giroux, 2004.

“political bias” in the classroom in the name of “student academic freedom”.¹¹⁷ Authors such as David Horowitz (2006)¹¹⁸ and Stanley Fish (2008)¹¹⁹ vocally condemned political ‘indoctrination’ in the classroom and have called for unbiased/apolitical content, predominantly in reaction to academics critical of American foreign policy, particularly regarding the Middle East. While Fish, as outlined above, argues for the narrowest interpretation of academic freedom to which students are not entitled, Horowitz’s anti-indoctrination efforts aimed to place student freedoms to the forefront. Former FSM activist, David Horowitz, founded “Students for Academic Freedom” which invited students to report on the speech activities of their professors in the classroom. Additionally, in the name of “student academic freedom”, Academic Bills of Rights were introduced in various states attempting to legislate against political discourse or the imposition of ideology in the classroom. The AAUP, along with other scholars, denounced both the “Academic Bill of Rights” and the later incarnation as “Intellectual Diversity Bills” for undermining academic freedom by chilling speech in the classroom and instructor rights and for appropriating language of equality, tolerance, and diversity for the purpose of advancing a conservative ideological agenda.¹²⁰ Schrecker (2010) describes that “[i]n its rhetorical support for academic freedom, the Academic Bill of Rights cleverly played upon the liberal value of tolerance as well as the postmodern insistence on the relative nature of truth.”¹²¹ But the critics of academic bills of rights

¹¹⁷ O’Neil 2008; Finkin and Post, 2009; Giroux 2006; Nocella et al, 2010.

¹¹⁸ David Horowitz, *The Professors: The 101 Most Dangerous Academics in America* (Washington: Regnery Publishing, 2006).

¹¹⁹ Stanley Fish, *Save the World on Your Own Time* (Oxford: Oxford University Press, 2008).

¹²⁰ See more on the AAUP’s discussion on Academic Bills of Rights and “Intellectual Diversity” online: <http://www.aaup.org/our-work/government-relations/academic-bill-rights>. See also O’Neil 2008; Nelson 2010; Finkin and Post, 2009; Fish 2008; Schrecker 2010.

¹²¹ Schrecker, 2010, p.146.

charge that they severely harm, rather than promote, both academic freedom – the right to teach and publish - and freedom of speech – both as private citizens and in the classroom:

The Academic Bill of Rights is a Trojan horse meant to destroy academic freedom. As with the appropriation of the term 'political correctness', here again, the right's clever tactic is to use liberal/left discourse against itself, to advance a far-right agenda that strips progressive professors of the right to publish, teach, and act as citizens as they wish. The bill does not protect free speech, it molests free speech, and it does so by forcing professors to interject right-wing theories into the classroom, by legislating what can and cannot be said before one's students, by overriding faculty self-governance through the authority of the state, and by subjecting course content and teaching to bureaucratic review and rebuke.¹²²

Additionally, Fish (2008), albeit expressly sympathetic to the intents of Horowitz' anti-indoctrination efforts and who asserts that students have very limited rights, opposes the politicization of the classroom, criticizes "Intellectual Diversity" bills for imperiling academic freedom. Fish describes such bills as:

[A]n effort to take instruction out of the hands of instructors by holding them to curricular quotas and threatening them with student lawsuits if they fail to comply. First of all, students do not have any rights except the right to competent instruction, and one part of being a competent instructor is the ability (and responsibility) to make judicious – not legislatively imposed – decisions about what materials and approaches are to be taught.¹²³

In the U.S., this co-optation of academic freedom language can also be seen in the activities of several groups, such as the "Freedom to Learn" organization seeking "stronger themes condemning abortion in school education curricula"¹²⁴ and *Campus Watch* - a website dedicated to "monitoring middle east studies on campus"¹²⁵ by encouraging students to report on their professors' speech in the classroom. Such an approach sets the rights of students against those of their instructors, instead of

¹²² Nocella et al, 2010, p.66.

¹²³ Fish, 2008, p. 123.

¹²⁴ Online: <www.freedomtolearn.org>

¹²⁵ Online: <www.campus-watch.org>

recognizing the symbiotic need for the classroom to be a space for teaching and learning without interference.¹²⁶

Separately from the regulation of classroom activities, several organizations in the United States were founded to monitor and advocate for general civil rights on campus. Free speech on campus continues to be a hot issue and not solely among the political right. An increasing focus on individual rights has permeated across the broader free speech movement, such as in the efforts of Foundation for Individual Rights in Education (FIRE),¹²⁷ an organization which litigates against unconstitutional speech codes on campuses and defends students' individual speech rights. Schrecker (2010) argues that "FIRE's libertarian stance complicates an assessment of its impact on higher education, since some of its actions do in fact support free speech and academic freedom against unjust administrations, while others seem more narrowly ideological."¹²⁸ The Centre for Campus Free Speech¹²⁹ and Free Exchange on Campus¹³⁰ are two other more conservative organizations attempting to prevent the stifling of left-leaning speech on American campuses. The Centre for Campus Free Speech works to promote the right of student organizing and protect the rights of student groups to collect levies and utilize campus space for their activities.

Student mobilizations in the U.S. were influential in the 1960s, advancing a discourse of student rights and freedoms that emerged along with radical student mobilizing on campus. Schrecker (2010) argues that the critique of academia vocalized by student protestors – particularly around racial discrimination and militarization during

¹²⁶ O'Neil, 2006.

¹²⁷ Online: <www.fire.org>

¹²⁸ Schrecker, 2010, p. 104.

¹²⁹ Online: <<http://www.campuspeech.org/>>

¹³⁰ Online: <<http://www.freeexchangeoncampus.org/>>

the Vietnam War – prompted the AAUP to respond to many issues students were raising. For example, faculty raised concerns that the military draft affected academic freedom. Those decades of mobilizing on campus were followed by a backlash that aimed to co-opt or re-appropriate the discourse of individual rights and equality. Students and faculty alike continue to face challenges to civil liberties within and outside the classroom particularly in the contemporary context of commercialization and competing political interests.

Academic freedom in the United States was first developed, defined, and elaborated by the professoriate, mainly through the leadership of the AAUP. But students participated significantly in the discourse and defense of academic freedom. They also made historic strides in advancing civil rights, free speech, and transforming curriculum and other parts of the academy throughout the 20th century. Where there has been an exploration of student academic freedom in the courts and in public discourse in the United States, it has not moved much beyond assertion of civil liberties and individual rights. While it makes some steps to advance the necessity of free speech and associational freedoms on campus, the contemporary discourses of student academic freedom are problematic. This next section turns to comparatively explore the trajectory of academic freedom and its intersection with student rights in Canada.

Academic Freedom in Canada

While definitions of, and processes for, defending their academic freedom of professors in Canada was largely influenced by the American tradition and especially the work of the AAUP, Canada was also influenced by the British tradition, which was more informal and led to a broader understanding and application of academic freedom.¹³¹ Academic freedom in Canada for faculty has evolved to consist of more (and generally

¹³¹ Thompson, 2011.

better) protections through labour law and strong language in collective agreements, which has provided more robust professional academic freedom safeguards in comparison to the weakened protections for American instructors.¹³² Adversely, student academic freedom as a concept had even more minimal uptake in Canada than in the United States. This is in spite of the fact that student mobilizing has adopted analogous and more secure union-inspired structures to faculty in Canada.¹³³

In *Academic Freedom in Canada: A History*, Michiel Horn (1998) provides an historical account of academic freedom in Canada since the late 19th century. Horn explains that university administrators originally defined academic freedom in a framework that prioritized institutional autonomy as the condition necessary for protecting it. He argues that this influenced original conceptualizations of academic freedom to emphasize institutional autonomy, even though he maintains that “the autonomy of universities does not equate with the freedom of those working in them.”¹³⁴ Faculty would later mobilize to emphasize professional rights associated with academic freedom.

According to Horn (1998), faculty began to collectively mobilize around academic freedom after the First World War. Mobilization escalated during the 1960s and 1970s when faculty sought protections to critique their institutions; speak freely outside of the classroom; and, participate meaningfully in university governance. Tenure was increasingly recognized as the linchpin for safeguarding academic freedom among scholars. At the forefront of this work was the Canadian Association of University

¹³² Nelson, 2010.

¹³³ It is important to note that Quebec students have mobilized in a distinct fashion compared to the rest of Canada, particularly since the Quiet Revolution in the 1960s. Some of these distinctions will be addressed in this chapter and in subsequent chapters.

¹³⁴ Horn, 1999, p. 61.

Teachers (CAUT), formed in 1951, which brought together faculty initially to pressure universities against mandatory retirement and establish due process for tenure.

1958 marked a turning point for academic freedom in Canada when the work of the Canadian Association of University Teachers (CAUT) took a national scale in defending academic freedom and democratic university governance. Professor Harry S. Crowe's firing from United College in Winnipeg, Manitoba catalyzed much of the formation of formal academic freedom principles and procedures.¹³⁵ From this point, CAUT built from AAUP's position on academic freedom and broadened its meaning to include the right to criticize one's institution as a pillar of academic freedom. CAUT subsequently worked with the Association of Universities and Colleges in Canada (AUCC) to advance a collegial governing structure in post-secondary institutions.¹³⁶

According to Horn, unionization and securing tenure were necessary for protecting academic freedom in Canadian universities. He explains:

In spite of the university's shortcomings, no other institution offers its employees the opportunity to seek knowledge for its own sake and organize it into a theoretical system, or publicly to provide disinterested analysis, criticism, and advice. Academic freedom – and the tenure that secures it better than anything else yet devised – has created conditions in which scholars and scientists can teach courses, undertake research, and publish findings that challenge conventional wisdom, and in which they can publicly state their findings without fear of retaliation by their employers.¹³⁷

Horn dismisses the notion that institutional autonomy is a component of academic freedom because the risks of institutional censorship and other internal pressures can damage academic rights. Horn explains:

[U]niversity autonomy may be a necessary but it is not a sufficient condition of academic freedom. The boards and executive heads of autonomous institutions have at various

¹³⁵ *Report Of The Investigation By The Committee Of The Canadian Association Of University Teachers Into The Dismissal Of Professor H.S. Crowe By United College, Winnipeg, Manitoba.* [Published as a special issue of the *CAUT Bulletin* Volume 7, Number 3, January 1959.] Online: Harry Crowe Foundation <<https://www.crowefoundation.ca/about/>>.

¹³⁶ Thompson, 2011.

¹³⁷ Horn, 1998, p. 354.

times undermined or stifled that freedom far more effectively than any outside agency has been capable of doing.¹³⁸

This position is shared by other Canadian scholars, including Green (2003) who agrees that "academic freedom is not to be identified with university autonomy. Universities are autonomous to the extent that they can set their internal policies with independence outside influence. Whether they respect academic freedom depends on the character of policies they set."¹³⁹ Despite a more expansive notion of academic freedom that developed in Canada, which includes the right to engage in public service and extramural expression, the notion of institutional autonomy has resonated in the courts and been a persistent creed among university administrators.

Nonetheless, as outlined in CAUT's policy statement on academic freedom, an institution is not free to censor or retaliate against academic staff who are publicly controversial or critical of the institution's activities:

Academic freedom includes the right, without restriction by prescribed doctrine, to freedom of teaching and discussion; freedom in carrying out research and disseminating and publishing the results thereof; freedom in producing and performing creative works; freedom to engage in service to the institution and the community; freedom to express freely one's opinion about the institution, its administration, or the system in which one works; freedom from institutional censorship; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies.¹⁴⁰

CAUT's academic freedom policy further rejects the inclusion of institutional autonomy in its definition:

Academic freedom must not be confused with institutional autonomy. Post-secondary institutions are autonomous to the extent that they can set policies independent of outside influence. That very autonomy can protect academic freedom from a hostile external environment, but it can also facilitate an internal assault on academic freedom. Academic freedom is a right of members of the academic staff, not of the institution. The employer

¹³⁸ Horn, 1998, p.164.

¹³⁹ Green, 2003, p. 385.

¹⁴⁰ Canadian Association of University Teachers, "Policy Statement on Academic Freedom", Article 2, Online: Canadian Association of University Teachers <<http://www.caut.ca/pages.asp?lang=1&page=247>>.

shall not abridge academic freedom on any grounds, including claims of institutional autonomy.¹⁴¹

To date, academic staff associations continue to maintain significant protection over their teaching and research conditions largely through collective agreement language.¹⁴² Unionizing continues to be a priority for securing broad rights in the academy – not only among full professors, but also graduate student employees, post-doctoral fellows, academic librarians, and other academic staff.

Canadian university administrators continue to advance a more narrow position of academic freedom. Reinforcing this ongoing discord between definitions of academic freedom, university presidents in Canada recently narrowed their formal definition of academic freedom – moving away from collegial governance, individual speech rights and institutional critique. On October 25th, 2011, the Association of Universities and Colleges in Canada (AUCC) announced at its 100th anniversary meeting the adoption of a newly revised statement on academic freedom.¹⁴³ It was further announced that adoption of the new statement would likely become criteria for institutional membership in the AUCC.

AUCC's academic freedom statement made some significant changes from decades of previously accepted definitions of academic freedom in Canada. Most notably omitted from this new statement are intramural and extramural expression, and

¹⁴¹ Canadian Association of University Teachers, "Policy Statement on Academic Freedom", Article 2, Online: Canadian Association of University Teachers <<http://www.caut.ca/pages.asp?lang=1&page=247>>.

¹⁴² See for example *University of British Columbia Faculty Association (Re: Dr. Mary Bryson and Master of Educational Technology) v. The University of British Columbia (unreported)*, Feb. 18, 2004 (Dorsey, Q.C.) for a landmark academic freedom decision in arbitration.

¹⁴³ Association of Universities and Colleges in Canada, "Canada's universities adopt new Statement on Academic Freedom," Press release, October 25, 2011. Online <<http://www.aucc.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom>>.

recognition for public service.¹⁴⁴ AUCC's statement revisions also further confound research integrity, institutional autonomy, and academic freedom:

[A]cademic freedom must be based on institutional integrity, rigorous standards for enquiry and institutional autonomy, which allows universities to set their research and educational priorities.¹⁴⁵

AUCC's revised statement highlights several responsibilities of academic freedom that further indicate a departure from a collegial model of governance. In part, this is revealed by the incorporation of issues in the statement that are extraneous to academic freedom, while asserting institutional autonomy:

This includes the institution's responsibility to select and appoint faculty and staff, to admit and discipline students, to establish and control curriculum, to make organizational arrangements for the conduct of academic work, to certify completion of a program and to grant degrees.¹⁴⁶

CAUT characterized AUCC's revisions as part of a "full scale attack on academic freedom"¹⁴⁷ by its omission of extramural expression, recognition of service and right to critique one's institution, along with the addition of issues in the academic freedom statement that are not related to academic freedom. In an open letter to AUCC critiquing the new statement, CAUT raised that "apparently, according to AUCC in 2011,

¹⁴⁴ Attempts to infringe on scholarly expressions, particularly in social science and humanities have manifested under the guise of academic misconduct, such as in the case of Professor Ward Churchill (see Scott 2009 and Schrecker 2010). Jon Thompson (2011) provides an important overview of research in the social sciences and humanities and political interference in the second chapter, "Research in the Social Sciences and Humanities", of his book *No Debate: The Israel lobby and free speech at Canadian Universities*.

¹⁴⁵ Association of Universities and Colleges in Canada statement on academic freedom. (October 2011) Online: <<http://www.aucc.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom>>.

¹⁴⁶ Association of Universities and Colleges in Canada (AUCC) statement on academic freedom. October 2011. Online: <<http://www.aucc.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom>>

¹⁴⁷ Wayne Peters, "AUCC's statement on academic freedom a wakeup call," (February 2012) 59:2 *CAUT Bulletin*. Online: <www.cautbulletin.ca>.

extramural speech rights have no place in statements on academic freedom."¹⁴⁸ In response to the elevating of the importance of institutional autonomy in AUCC's statement, CAUT noted:

It is absolutely true that academic institutions must not restrict the freedom of academic staff because of outside pressure – be it political, special interest group, religious – and institutions need to be autonomous in that sense. But to pretend that building a moat around the university protects academic freedom is disingenuous and ignores the reality of internal threats to academic freedom.¹⁴⁹

CAUT president Wayne Peters wrote that such an affront to academic freedom was coming from an unusual source and at a time when "the voice of academic staff in institutional decision-making is diminishing as a more top-down, corporate-style, managerial culture supplants traditional collegial governance."¹⁵⁰ Like the reports in the U.S. on the creeping corporatization of higher education,¹⁵¹ Canadian colleges and universities are also facing similar pressures.¹⁵² And thus, the AUCC's attempts to "downsize" its definition of academic freedom indicates that university administrators continue to internalize a more corporate model of education, seeking to define the parameters of scholarly freedoms. It is also important to note here that the AUCC statement refers to a student's "right to learn" without much discussion about what this entails. The adoption of the statement has also been controversial for some university presidents. Most notable was the resignation of University of Toronto president David Naylor who stepped down from the AUCC board immediately after the adoption of the

¹⁴⁸ Open letter from CAUT president Wayne Peters to AUCC president Stephen Toope. (4 November 2011) Online: <<http://www.caut.ca/pages.asp?page=1042>>.

¹⁴⁹ *Ibid.*

¹⁵⁰ Peters, 2012.

¹⁵¹ See more from Schrecker (2010), Washburn (2005), Slaughter and Leslie (1997).

¹⁵² Horn 1998; Turk 2000; Claire Polster, "The nature and implications of the growing importance of research grants to Canadian universities and academics," (2007) 53 Higher Education 599–622.

new statement. However, the amended statement is being adopted by some institutions, despite concern raised by faculty and students. University of Regina is one of the more recent institutions to adopt the statement.¹⁵³

Given the apparent problems in their revamping of the definition of academic freedom, it will be important to be reflective of how “student rights” activities have emerged in the U.S. under the banner of “student academic freedom” and consider how this revised definition invites a similar style of academic freedom politics in Canada.

Privatization, Public Education and Canadian Campuses

The proprietary trend in universities and university research that accelerated in the U.S. with the adoption of the *Bayh-Dole Act* also influenced the corporatization of university research in Canada. The risky relationship between corporate interests and university research in Canada has resulted in some of the most renowned academic freedom scandals internationally. The academic freedom cases of Dr. Nancy Olivieri¹⁵⁴ and Dr. David Healy¹⁵⁵ reveal the encroachment of uneasy relationships between corporate university funding and academic freedom. Penni Stewart (2010) warns that the commercial shift in higher education favouring a corporate style culture on Canada's campuses has serious overall implications for the academy by fostering anti-intellectualism and consumerism:

Academic freedom and freedom of expression are today in grave danger of curtailment, from...a rising tide of anti-intellectualism...and...a multidimensional campaign against genuine democracy...The ascendancy of entrepreneurial university managements who emphasize a market-based rationality in which education becomes a consumer good, and who have a correspondingly anxious eye on consumer satisfaction and public

¹⁵³ Taouba Khelifa, “Losing the Academic Voice’ (22 November 2012) *The Carillon*. Online: The Carillon < <http://www.carillonregina.com/?p=10209>>.

¹⁵⁴ Jon Thompson, Patricia Baird, and Jocelyn Downie, *The Olivieri Report: The Complete Text of the Report of the Independent Inquiry Commissioned by the Canadian Association of University Teachers* (Toronto: Lorimer, 2001).

¹⁵⁵ For more information, go to <http://www.pharmapolitics.com/>.

relations as well as governments concerned with fiscal constraints, corporate ties and short term priorities, are paving the way for dangerous widespread institutional change.¹⁵⁶

Professor Howard Woodhouse also explores this growing problem of market-based higher education in his book *Selling Out: Academic Freedom and the Corporate Market*.¹⁵⁷ He argues that Canadian universities must assert independence from industry to protect academic freedom and the critical search for knowledge. Within this market model, Woodhouse argues that corporate donors threaten freedom of expression by attempting to undermine political activity on campus. Administrative policies, such as space booking policies and naming and branding activities, are used as tools to stifle expressive activities. He argues that such activities are in contradiction with the purpose of the university:

The value of critical understanding, which lies at the core of university life, is fundamentally opposed to the corporate practices of maximizing monetary profits.¹⁵⁸

Woodhouse also argues that:

In direct contrast to the market model of education...academic freedom is indispensable to the critical search for knowledge...Academic freedom enables professors and students to espouse views and to articulate theories that differ from those dominant in their discipline, their university, and/or their society. Dissenting views can flourish because they are protected.¹⁵⁹

Woodhouse concludes by arguing for a respect of abstract and practical knowledge, which fosters imagination in learning. He contends that such values need to radically replace the current market-value orientation of Canadian universities in the form of a

¹⁵⁶ Penni Stewart, "Academic Freedom In These Times: Three Lessons From York University" (2010) 2:2 Cultural and Pedagogical Inquiry p. 49.

¹⁵⁷ Howard Woodhouse, *Selling Out: Academic Freedom and the Corporate Market* (Montreal: McGill-Queen's University Press, 2009).

¹⁵⁸ Woodhouse, 2009, p.21.

¹⁵⁹ Woodhouse, 2009, p.38.

“civil commons” that fosters “seeking and sharing knowledge among a community of learners.”¹⁶⁰

Giroux and Giroux (2004) also warn of the dangers of commercialism on higher education and to democracy more generally. They maintain that academics have obligations as civic educators, or public intellectuals. Public intellectualism, they argue,

Situates education not within the imperatives of specialization and professionalization, but within a project designed to expand the possibilities of democracy by linking education to modes of political agency that promote critical citizenship.¹⁶¹

However, Giroux and Giroux warn that universities are in danger of becoming “consumer-oriented corporation[s],”¹⁶² where “students are treated as consumers and trained as workers, and faculty are relegated to the status of contract employees.”¹⁶³ They conclude that academics need to defend academic freedom because it is a public good. Further, they argue that its defense “cannot be made in the name of professionalism, but in terms of the civic good such intellectuals provide.”¹⁶⁴

Is Academic Freedom a Right in Canada?

Perhaps the most significant distinction between academic freedom in Canada and the United States exists in the disparate constitutional jurisprudence on this issue. Where American academic freedom jurisprudence most centrally focuses on its relationship to the 1st Amendment, Canadian jurisprudence has evolved quite differently – leaving academic freedom to be predominantly safeguarded through robust language in collective agreements and university policies. In fact, the Supreme Court of Canada

¹⁶⁰ Woodhouse, 2009. p. 263.

¹⁶¹ Henry A. Giroux and Susan Searls Giroux, *Take Back Higher Education: Race, Youth, and the Crisis of Democracy in the Post-Civil Rights Era*. (New York: Palgrave MacMillan, 2004) 118.

¹⁶² Giroux and Giroux, 2004, p. 276.

¹⁶³ Giroux and Giroux, 2004, p. 276.

¹⁶⁴ Giroux and Giroux, 2004, p. 277.

ruled in *McKinney v. University of Guelph* (1990)¹⁶⁵ that universities are not subject to scrutiny under the *Canadian Charter of Rights and Freedoms*, at least not in their employment relations. As will be discussed further in the next chapter, the majority accepted the argument that universities required institutional autonomy to preserve academic freedom. As Horn stated: "unless and until the Court overturns this ruling, those who believe that the Charter can be used to defend academic freedom are almost certainly mistaken."¹⁶⁶ Despite this difference, Canadian courts have still upheld the principles of academic freedom in other jurisdictions, such as at the human rights tribunal¹⁶⁷ and by the privacy commissioner.¹⁶⁸

While universities are not explicitly subject to *Charter* scrutiny, it is generally accepted that expressive freedoms and other rights are protected at universities. Lynn Smith (2000) explains:

It has been suggested...that within the university there is a lesser right to freedom of expression or other Charter rights than exists outside the university. In my view, that is not the case...the university is not a Charter-free zone. Everyone within the university has the same Charter rights as all other citizens. Constraints on the activities of the police and other agents of the government apply on campuses as they do everywhere else...Similarly, if arrests or searches on campus infringe the Charter, they can be challenged.¹⁶⁹

As we will see in subsequent chapters, the question of whether universities are immune to *Charter* scrutiny is one that continues to be contested in the courts. And while academic freedom among the professoriate should be reinforced through tenure and

¹⁶⁵ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229.

¹⁶⁶ Horn, 1998, p. 307.

¹⁶⁷ *McKenzie v. Isla*, 2012 HRT0 1640 (CanLII).

¹⁶⁸ *University of Ottawa (Re)*, 2012 CanLII 31568 (ON IPC).

¹⁶⁹ Lynn Smith, "What's at Stake? Intersections and Tensions Sharon E. Kahn and Dennis Pavlich, eds, *Academic Freedom and the Inclusive University* (Vancouver: UBC Press, 2000), 220.

collective agreements, the viability of campuses as vibrant spaces for intellectual inquiry and critical thinking could possibly be bolstered by the confirmation of *Charter* freedoms in post-secondary institutions. While these questions will be explored further in Chapter 3, I will move now to explore the role of student rights in the development of academic freedom and other liberties in Canada.

Academic Freedom and Students' Special Rights

Aside from their general civil liberties, students have a special role and special rights in their pursuit of higher education, says law professor, Les Green (2003). Among these are expressive rights inside and outside the classroom. Part of these special rights for students may include the instructor's right to question laws and structures that support the status quo. In his article, "Civil Disobedience and Academic Freedom," Green argues that "[e]veryone is entitled to freedom of speech; teachers and students, especially in the classroom, are also entitled to further protections associated with their roles. Academic freedom is thus a matter of *special rights*, not general rights."¹⁷⁰ Green observes that there are "role-related special rights" associated with academic freedom, thus students and professors enjoy specific special rights in the context of the university. He explains: "No plausible justification for special academic rights can proceed without regard to the way universities are dedicated not to just inquiry, but to education."¹⁷¹

Green proposes that there exists both freedom and responsibility to discuss controversial topics in the classroom, such as in the instruction of principled forms of law-breaking or civil disobedience. Academic freedom, he argues, enables the university community to study, discuss, and even recommend civil disobedience and questions

¹⁷⁰ Leslie Green, "Civil Disobedience and Academic Freedom" (2003) 41(2-3) Osgoode Hall Law Journal 385.

¹⁷¹ Green, 2003, p. 385.

whether this extends to the right to engage in civil disobedience. Academic freedom as a right was secured through principled struggles and even at times through law-breaking. Green subsequently explores the extent to which collective agreements and tenure can protect the academic freedom to teach civil disobedience. And within this context, he questions whether the imposition of speech codes and codes of conduct on students is even constitutional. He explores the conundrum between the reality that civil disobedience is on the one hand necessary in a democratic society and yet it condones certain types of law-breaking – a particular dilemma for a law professor. Green concludes that, while teachers should not coerce students into civil disobedience, they have a duty to teach students about “inconvenient facts”. He writes: “We [faculty] are to prepare students to choose among fundamental values and not to shy away from unpleasant realities or indulge in wishful thinking as they ‘take a stand.’”¹⁷² Thus, it is appropriate to teach, study, and assess the value of civil disobedience and that the university has a duty to students and teachers alike to support such teachings. Teachers, he argues, have a duty to exercise their academic freedom, not simply for themselves, but for their students as well. As a group of *special rights* beyond the freedom of speech rights afforded to students and teachers alike in the classroom, academic freedom rights are generalized and encompass what is necessary for teaching and learning. Green’s analysis is valuable, not only for illustrating the foundational assumptions for conceptualizing the relational rights between students and instructors, but also for provoking the importance and public duty of fostering critical analysis of laws and institutions. Giroux and Giroux (2004) go even further to argue that higher education institutions should offer “students the opportunity to involve themselves in the deepest

¹⁷² Green, 2003, p. 402.

problems of society and to acquire the knowledge, skills, and ethical vocabulary necessary for critical dialogue and broadened civic participation."¹⁷³

Student Rights and Student Activism in Canada

Canadian students have supported academic freedom and speech rights for faculty on campus since the late 1890s.¹⁷⁴ However, despite student mobilizing for their rights to engage in political activities, student participation in governance, institutional critique, associational activities and unionizing, the literature chronicling and analyzing student mobilizing in Canada is minimal. Michiel Horn (1998, 1999) argues that, as early as 1895, students in Toronto staged a strike growing out of a concept of student academic freedom that sought to reinforce associational and expressive activities.

One of the most remarkable manifestations of student activism in Canadian history, the Toronto student 'strike' of February 1895, was partly the result of the growth of a concept of student academic freedom that included the activity of the campus clubs, the freedom of students to invite outside speakers to the campus, and the right of the student press to criticize professors and the actions of the University Council [the highest governing body].¹⁷⁵

Despite organizing around student rights that began over a century ago, Horn (1998) argues that the notion of *Lernfreiheit* did not gain the same traction as in Germany since early Canadian universities operated under an *in loco parentis* model. Horn states: "Although *Lehrfreiheit* had influenced the North American idea of academic freedom, *Lernfreiheit* had no significant effect on this side of the Atlantic. It was incompatible with a tradition that placed administrators *in loco parentis* over students."¹⁷⁶ Students' unions and the student press were largely under the control of university administrations until the 1960s, thereby maintaining a form of "student government" as opposed to more

¹⁷³ Giroux and Giroux, 2004, p. 279.

¹⁷⁴ Horn, 1998.

¹⁷⁵ Horn, 1999, p. 2.

¹⁷⁶ Horn 1998, p. 322.

contemporary "students' union" models that prevail in most university and many college students' unions. Prior to the 1960s, the Canadian university student population was predominantly elite, representing only approximately 3% of the overall population, and universities "served as a surrogate parent"¹⁷⁷ to regulate both the personal and academic conduct of students as they studied away from their parents' supervision.¹⁷⁸

Horn recounts that, prior to the 1960's most professors and administrators were largely of the view that "students had no claim to academic freedom in any form because they lacked the knowledge necessary to make informed judgments."¹⁷⁹ Even though students historically supported faculty academic freedom rights, it was not until the 1960s that students began to more explicitly advance their own rights on campus – mainly in the context of free expression in the classroom, inviting outside speakers to campus without administrative or political interference, and for accessibility in education. More generally, they began opposing the parental role of administrations and shed a certain degree of infantilization previously ascribed to them.¹⁸⁰ Influenced by student activism in the U.S. and across the globe, Canadian students became more engaged in civil rights activism and anti-war activities on campus in the sixties. During this time, students, along with faculty, gained representation in institutional governance. Student activism also prompted greater autonomy among student campus activities. Horn explains: "Students secured a greater freedom of expression and association, as the supervision that university authorities had long exercised over campus publications and student clubs came largely to an end."¹⁸¹ Student mobilizing prompted administrators to

¹⁷⁷ Hewitt, 2002, p. 5.

¹⁷⁸ Hewitt, 2002.

¹⁷⁹ Horn, 1999, p. 2

¹⁸⁰ Horn, 1998.

¹⁸¹ Horn, 1999, p. 29.

respond. Horn (1998) recounts the writings of former University of Toronto President Claude Bissell whose "Academic Freedom: The Student Version" (1969),¹⁸² argued that students sought to move beyond merely defending freedom of speech and the right to invite speakers to campus and demanded greater autonomy and involvement in collegial governance. Bissell argued that faculty would be disinclined to share the power over tenure, appointments, and promotion because it would destroy the freedom of teachers in the classroom. However, not all faculty perceived such discord between student activism and faculty rights at the time. Horn (1998) explains that former CAUT president C.B. Macpherson supported student interests in approaching the university as a place to develop 'critical intellectual ability' and called on professors to be 'more critically aware' of their position in society.¹⁸³ However, *Lernfreiheit* still made no traction in academic freedom discourses moving forward. Freedom of expression for students, in that students could criticize the university and their professors and that they could invite outside speakers, became more commonly accepted, but not student academic freedom.

As students' unions and student groups began to flourish during the sixties and seventies, security forces took greater interest in monitoring formal student organizing. Hewitt (2002)¹⁸⁴ recounts the involvement of the Royal Canadian Mounted Police (RCMP) and Canadian Security Intelligence Service (CSIS) on Canadian campuses throughout the 20th century. Initially concerned about the rise of communism prior to the Cold War, state security directed more attention and resources to monitoring ostensibly

¹⁸² Claude Bissell, "Academic Freedom: The Student Version" (Summer 1969) 76:2 *Queen's Quarterly*.

¹⁸³ C.B. Macpherson, "The Violent Society and the Liberal," 18:1 *CAUT Bulletin*, (Oct 1969), cited in Horn 1998.

¹⁸⁴ Steve Hewitt, *Spying 101: The RCMP's Secret Activities at Canadian Universities, 1917-1997* (Toronto: University of Toronto Press, 2002).

subversive activities among students, professors, and outside visitors to campus. Later, black student groups, anti-war organizers, left-leaning and labour groups, and women's and gay rights activists all became targets of security interest. Hewitt added that, while Canada did not witness the brazen crackdown on communist ideology as was seen under American McCarthyism, there was still "little tolerance, especially in the United States but also in Canada, for the traditional dissent universities offer."¹⁸⁵ He further noted that the proliferation of tenure in the sixties and seventies meant that apparently "radical" professors were able to be more openly vocal and opinionated with less risk of retaliation. Thus, academic freedom successfully diversified the political landscape away from the status quo.

At a national level, students had been organizing since the National Federation of Canadian University Students (NFCUS) was formed in 1927. By the 1950s, student activism was markedly influential in the "determination of welfare state policy,"¹⁸⁶ particularly through the national coordination of NFCUS. Students affected government policies on higher education through collective action, such as lobbying, protests, and public support – leading to the introduction of the Canada Student Loans Program in 1964 and a federal tuition fee freeze tied to federal grant levels in 1967.¹⁸⁷

It is important to note here that student mobilization in Quebec in the 1960s and 1970s was especially influenced by trade unionism and student syndicalism. Quebec students adopted a Student Charter when Quebec student associations split from the Canadian Union of Students (CUS), the successor organization of NFCUS, to form the

¹⁸⁵ Hewitt, 2002, p. 257.

¹⁸⁶ Nigel R. Moses, "Student Organizations as Historical Actors: The Case of Mass Student Aid," (2001) XXXI:1 The Canadian Journal for Higher Education 79.

¹⁸⁷ Moses, 2001.

Union générale des étudiants du Québec (UGEQ).¹⁸⁸ At that time, CUS unsuccessfully attempted to adopt a similar Charter.¹⁸⁹ Despite the inability of members of CUS to adopt a student charter, the organization continued to be an influential site for student collective action, through local students' unions working together, nationally and internationally. Moses explains the difference between the rise of the new left in Canada and the United States:

In the U.S., the SDS developed as a separate new left organization while in Canada, CUS [the Canadian Union of Students] became the new left, while maintaining, unlike SDS, its basis of organization and representation in local student councils.¹⁹⁰

Even though Canadians would not witness the same degree of militancy in student activism compared to the United States, students were still politically active, engaged, and influential through their organizing. CUS wound down in 1969, in part due to the departure of the Quebec student associations, but also in part because students critical of the organization's political tendencies became more vocal in the ranks. But similar to the recession of student activity in the late sixties in the United States, CUS and UGEQ became defunct in 1969 only to resuscitate in two new national organizations a few years later. Moses (2001) observes that the dissipation of a vocal student movement in the late sixties and early seventies was the result of co-optation of the new left by liberals and conservatives seeking to placate the "subordinate social force" that was

¹⁸⁸ In 1963, students in Quebec decided that they could not support NFCUS's position on federal aid, as it was seen to interfere with provincial jurisdiction. Seeking to focus its mobilization with a Quebec nationalist intent at the peak of Quebec's Quiet Revolution, UGEQ was formed. Even though NFCUS transformed to the Canadian Union of Students and modified its policy to cease federal lobbying, Quebec student associations withdrew from the newly formed CUS in 1964 with the introduction of the Canada Student Loan Program. The adoption of cessation of federal aid lobbying was followed by a focus on provincial mobilizing. For more see Moses, 2001.

¹⁸⁹ Its successor organization, the Canadian Federation of Students, later adopted a comprehensive "Declaration of Student Rights".

¹⁹⁰ Moses, 2001, p.110.

emerging in the student movement.¹⁹¹ He argues that this co-optation occurred because it was recognized that collective action from the social movement had the capacity to create real political and social influence. Moses (2001) notes:

Tuition fees were frozen [in 1967] as a direct result of student council and CUS protest. University administrators were startled and worried by the development of social movements among their students: anti-war, anti-racist, anti-capitalist movements and, by the late 1960s, feminism. It is no coincidence that tuition fees remained stable throughout the most radical period of Canadian student organization history (1965-1972).¹⁹²

Since the 1980s, Canadian students organized into various groups on campuses, securing funding to autonomously run various groups – from women's centres, to queer centres, and minority student groups and public interest research groups. Students' unions became sites of advocacy and services, entrenching their revenue streams and security through the development of constitutions and bylaws, incorporation, membership dues and sometimes other revenue generating or subsidized programs. Daycares, credit unions, student papers, and campus pubs are all examples of services and programs students established and collectively operated. In Quebec, and later British Columbia, legislation was enacted to ensure students union security (more in Chapter 4). However, similar to the backlash activities witnessed on American campuses after September 11, 2001, a noted backlash to student organizing has also occurred in Canada. For example, reports have surfaced to indicate interest in student union and other student group activities. For example, Wikileaks¹⁹³ documents reveal that the Millennium Leadership Fund, founded in 2000 and receiving donations from senior political officials of the Ontario progressive conservatives, was funding students to run for students' union elections and encouraged students to defund or disaffiliate from

¹⁹¹ Moses, 2001, p. 84.

¹⁹² Moses, 2001, p.112.

¹⁹³ OPCCA workshop on how-to take over student governments, 2009, Online:
<http://www.wikileaks.org/w/index.php?title=OPCCA_workshop_on_howto_takeover_student_governments,_2009&redirect=no>.

various student groups, most notably the Public Interest Research Groups and the Canadian Federation of Students.¹⁹⁴ Additionally, as revealed in the documents, conservative campus groups began to identify the defunding of such groups as a priority. O'Connor and Stacey (2012) explain: "Their [Ontario Progressive Conservative Campus Association or OPCCA] anti-PIRG ambition is part of an explicit strategy to bring grassroots legitimacy to the conservative movement and to train their youth members."¹⁹⁵ The targeting of public interest research groups and the Canadian Federation of Students indicates efforts by the conservative movement to immobilize broad political activities on campus, rather than foster diverse political and social activity.

Students and their associations continue to raise questions about student rights on campus. For example, responses to student activism and dissent have led to legal and administrative sanctions against participants with suspected targeting of both individual activist students and elected student representatives (University of Toronto,¹⁹⁶ York University,¹⁹⁷ University of Ottawa).¹⁹⁸ Universities have also been recently accused

¹⁹⁴ Clare O'Connor and Kalin Stacey, "Defunding the public interest: Conservative strategy and the fight for the PIRGs," (September 2012) *Briarpatch Magazine*. Online: Briarpatch Magazine <<http://briarpatchmagazine.com/articles/view/defunding-the-public-interest>>.

¹⁹⁵ O'Connor and Stacey, 2012, p. 16.

¹⁹⁶ See John Bonnar, "Students and community demand charges against U of T 'Fight Fees 2' be dropped", *rabble.ca* (6 August 2009) online: Rabble.ca <www.rabble.ca>; and, John Bonnar, "Judge stays charges against 'Fight Fees 2'", (12 September 2009) *rabble.ca* online: Rabble.ca <www.rabble.ca>; and, Tim Groves, "Activists sue University of Toronto and Toronto Police for Charter violations and wrongful arrests after fee hike protest" (27 October 2010) *Toronto Media Coop*, online: Toronto Media Coop <Toronto.mediacoop.ca>.

¹⁹⁷ York Federation of Students. News Release, "Student leader stands up against racism, sentenced under York University Student Code of Conduct" (25 May 2009). Online: Canada Newswire <<http://www.newswire.ca/en/releases/archive/May2009/25/c7387.html>>

¹⁹⁸ Charlotte Bailey, "Wolfe's words lead to arrest: SFUO president charged for cursing following Student Appeal Centre incident" 3 February 2010 *The Fulcrum*, Online: The Fulcrum <<http://www.thefulcrum.ca/articles/25884>>.

of making efforts to interfere in student union autonomy (Carleton University,¹⁹⁹ York University)²⁰⁰ and imposing further restrictions on student group access to space (University of Toronto,²⁰¹ University of Ottawa).²⁰² This is raising new questions about the contemporary precariousness of association and expressive rights on campuses in the new political and economic context.

Additionally, influences on student extra-curricular activities in Canada are coming from external organizations. For example, in February 2010, a new organization entitled Advocates for Civil Liberties was founded which seeks to collaborate "with academic officials to devise appropriate, enforceable ground rules for campus political activities. Increasingly, demonstrations such as, but not limited to, the upcoming "Israeli Apartheid Week" on campus, create a hostile atmosphere, and one that stifles the genuine exchange of views on sensitive Middle East issues."²⁰³ Carleton University also recently came under fire for accepting an agreement from a donor that would not only hand over too many rights in terms of faculty appointments and curriculum development,

¹⁹⁹ "Student Union Fees Freed at Carleton", (December 2010) 57:10 *CAUT Bulletin*, online: CAUT Bulletin <http://www.cautbulletin.ca/en_article.asp?SectionID=1290&SectionName=News&VolID=312&VolumeNa=No%2010&VolumeStartDate=12/9/2010&EditionID=32&EditionName=Vol%2057&EditionStartD=1/14/2010&ArticleID=3166>.

²⁰⁰ York Federation of Students, News Release, "Conservative Politicians and York University Administrators Revealed Interfering in York Student Elections", (5 July 2009) online: Canada Newswire <<http://www.newswire.ca/en/releases/archive/July2009/06/c4053.html>>.

²⁰¹ Liisa Schofield, "Exposed: University of Toronto Suppresses Pro-Palestinian Activism", (19 February 2009) E-Bulletin 188, *Socialist Project* online: Socialist Project <<http://www.socialistproject.ca/bullet/bullet188.html>>; Maria Cichosz, "SPACEDOUT: Maria Cichosz Explains how the university's new space-booking policy further marginalizes campus community groups" (8 November 2010) *The Varsity* online: The Varsity <<http://thevarsity.ca/articles/37154>>.

²⁰² Matthew Morgan, "University of Ottawa spied on leading Burmese activist" (14 May 2010) *rabble.ca* online: Rabble.ca <<http://www.rabble.ca/news/2010/05/university-ottawa-spied-leading-burmese-activist>>.

²⁰³ Fern Sidman, "Advocates for Civil Liberties Hold First Forum: Jews Fight Back," *Israel National News* (20 February 2011) online: Israel National News <<http://www.israelnationalnews.com/News/News.aspx/142416>>.

but that was intended to train conservative political staff.²⁰⁴ With the proliferation of student judicial affairs in university administrative structures, no evidence of a cessation of student mobilization in the face of rising tuition fees and debt loads, and continued controversial and contentious political debates, it is unlikely the near future that students will cease questioning the parameters of their rights to associate, express and engage in critical inquiry on campus.

Towards a Freedom to Learn

All members of the academic community, including faculty, researchers, librarians, graduate and undergraduate students contribute to the pursuit of knowledge and critical inquiry. They are affected by and benefit from academic freedom. However, students are not professionals and thus do not need the same type of safeguards for academic freedom. But, this learning ought to be more than mere skills training. In order to serve their public functions, universities need to be fostering "independence of mind." If this is the goal of academic freedom, then there is an aspect of academic freedom that includes students. Students are significantly affected by academic freedom inside and outside the classroom. Students must enjoy robust civil liberties but they also have role-related rights. In the classroom, they have the right to critical inquiry, quality instruction, access to educational materials, fair processes for evaluation, and they must be able to do so without political or corporate interference. Outside of the classroom, they also have a set of special role-related rights in relation to their role in the university community. Thus, they have the right to book campus spaces for their autonomous activities and events, to collectively organize through student groups and associations, and to participate in the collegial governance structures of the university in order to have

²⁰⁴ Bruce Cheadle, "Carleton University admits to issues with \$15-million donor deal for politics school," *The Globe and Mail* (13 July 2012) online: The Globe and Mail <www.theglobeandmail.com>.

a voice in the academic directions of the university. Students further have the right to exercise their civil liberties without facing academic sanctions. These are the elements of learning freedoms compatible with an academic freedom for the common good.

To learn, students require spaces for critical thought and inquiry to challenge hegemonic and other regulatory practices maintaining the status quo. This is quite different from a style of "student academic freedom" co-opted by neo-conservative interests in the U.S. aiming to end political indoctrination or left-leaning speech in the classroom. The "student academic freedom" movement in the U.S. in fact utilizes concepts of "academic freedom" and "intellectual diversity" in ways that constrain, instead of cultivate, intellectual processes. The freedom to learn for students means that they need to have access to opportunities inside and outside the formal classroom to engage in the process of critical inquiry, debate, critique, and even dissent. Faculty, in order to enjoy the freedom to teach, require that students are symbiotically situated as students available to engage in critical thinking, ask questions without retaliation, and explore the content of their curriculum independently from the formal enclaves of the classroom.

There is no doubt overlap between the civil liberties students enjoy as citizens and their rights as students. As public institutions, Canadian universities ought to ensure robust civil liberties for all citizens, but there is a particular duty to ensure the fostering of "independence of mind" for students. Like their faculty counterparts, one of the essential conditions for students to engage in the university community is by collective organizing and associating with their peers. Faculty have achieved security through their right to teach and research through the entrenchment of academic freedom principles defined by the professoriate and supported through the CAUT. They have further established important conditions for tenure and academic freedom language in their collective agreement. The casualization of academic labour is one of the biggest contemporary

threats to the long-term security of academic freedom as contract academic staff are stifled from truly exercising their academic freedom. Students' ability to organize independently is one of the foundational rights they have identified. As a relatively vulnerable group, students organize relying on collective strength. They can also associate along various cultural, religious, artistic, political, social, and academic interests which cultivate an even greater diversity to campus scholarly activities. For this purpose, their access to higher education in general, and opportunities to engage in expressive and collective activities on campus are crucial.

Scholars have continued to stress the importance of learning unhindered by external pressures or infringements to individual rights – and in the interest of fostering critical thought and public knowledge.²⁰⁵ There is no shortage of scholarly writing on the contemporary demise of academic freedom and teaching and research, but few have meaningfully explored the pedagogical rights of students or the freedom to learn. As Finkin and Post affirm “students cannot learn how to exercise a mature independence of mind unless their instructors are themselves free to model independent thought in the classroom.”²⁰⁶

While individual liberties in the university context are important, the broader collective goals must be kept at the forefront of any pedagogical, legislative, and juridical pursuits. Moving forward, we need to consider the context that has led to good (albeit weakening) protections for faculty. If tenure is a necessary condition for protecting academic freedom, broader protections are also necessary for students in protecting the freedom to learn on campus – either through improved legislation or better administrative policies. The following chapters explore these conditions, mainly in the

²⁰⁵ Green 2003, Washburn 2005, Woodhouse 2009, Finkin and Post 2009, Schrecker, 2010.

²⁰⁶ Finkin and Post, 2009, p. 81.

context of associational and expressive activities in contemporary policies, judicial, quasi-judicial and legislative elements affecting students' freedom to learn.

Chapter 3 – Higher Education in Canadian Courts

Canada's federal and provincial governments recognize the vital public purpose of higher education by supporting and regulating post-secondary education in several ways: through statutes, operational and research funding, and student financial support. In spite of this public purpose, universities operate autonomously from government, with a high degree of independence in their decisions recognized by the courts. Universities and colleges are regulated by legislation in Canada under provincial jurisdiction.²⁰⁷ While universities are subject to human rights legislation and judicial review, their obligations to uphold the *Charter* are legally unresolved – leaving questions of general liberties in universities precarious. Simultaneously, universities tend to be developing more extensive quasi-judicial frameworks for regulating campus activities – providing for alternative mechanisms to resolve disputes and other issues on campus. It is not clear whether such internal mechanisms are preferable to escalating litigation or whether they are problematic in the absence of greater external oversight.

In an increasingly litigious social environment, with the escalating commercialization of education, and mounting importance of post-secondary education as a necessary prerequisite for employment, students are seeking more resolutions from the courts to protect their academic success. Students have claimed tort damages and human rights violations, and procedural breaches when they perceive their access to education and learning conditions to have been compromised. This chapter investigates what legal, administrative, and legislative conditions intersect with students' rights and responsibilities in higher education institutions in Canada. Primarily, this chapter reviews

²⁰⁷ The exceptions to this are First Nations University of Canada and the Royal Military College, which are both governed by federal legislation.

and analyzes how the courts have defined the role and purpose of universities, academic freedom, and student relations.

The *Charter* and Post-Secondary Institutions in Canada

The previous chapter explored the relationship between general liberties and specialized rights in the academy as they relate to academic freedom and even student rights. In Canada, the application of general liberties in post-secondary institutions has received disparate theoretical and judicial analysis. Fortunately, a greater saturation of unionization among Canada's academic staff means that most academic freedom decisions are addressed in arbitration law. However, other areas of law have also explored the concept of academic freedom, particularly as a rationale for maintaining the courts' deference to allow universities to operate with little interference by the courts.

The *Canadian Charter of Rights and Freedoms*,²⁰⁸ enacted in 1982, offers constitutional protection of rights and liberties in Canada in the context of certain government activities. In 1990, three Supreme Court of Canada decisions contemplated how the *Charter* would apply to post-secondary institutions: *McKinney v. University of Guelph*,²⁰⁹ *Harrison v. University of British Columbia*,²¹⁰ and *Douglas/Kwantlen Faculty Assn. v. Douglas College*.²¹¹ *McKinney* and *Harrison* concluded that even though universities provide a public function and are governed by legislation, they are not subject to the *Charter*. The majority in *McKinney* concluded that Section 32 was deliberately narrow and that excluding universities from *Charter* scrutiny was necessary for protecting university autonomy. La Forest, J. wrote:

²⁰⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

²⁰⁹ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229.

²¹⁰ *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451.

²¹¹ *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570.

While universities are statutory bodies performing a public service and may be subjected to the judicial review of certain decisions, this does not in itself make them part of government within the meaning of s. 32...The fact that a university performs a public service does not make it part of government.²¹²

The Court concluded that, because of their historical independence, and for the purpose of preserving academic freedom, universities are independent - albeit not entirely independent - from government, and therefore excluded from *Charter* scrutiny. La Forest J. recognized that academic freedom was vital in a democracy. But in the context of mandatory retirement policies, if governments were to intervene in employment matters of academic staff, academic freedom could be compromised. The prevailing characteristics of the university that qualified its exemption from *Charter* review were its autonomous operations from government:

The fact is that the universities are autonomous, they have boards of governors, or a governing council, the majority of whose members are elected or appointed independent of government. They pursue their own goals within legislated limitations of their incorporation. With respect to the employment of professors, they are masters in their own houses.

The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom.²¹³ [Emphasis added]

That same year *Harrison v. British Columbia*²¹⁴ confirmed the *McKinney* decision that the *Charter* did not apply to university employee relations – again in the context of mandatory retirement policies. A test was developed to distinguish between “ultimate or extraordinary control” and “routine or regular control” by the government and the Court concluded:

The fact that the university is fiscally accountable under various acts did not establish government control upon the core functions of the university and, in particular, upon the policy and contracts in issue.²¹⁵

²¹² *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at p. 7.

²¹³ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at p. 53.

²¹⁴ *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (1990). Again, L'Heureux-Dubé, J. and Wilson, J. dissenting.

²¹⁵ *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 at p. 17.

In contrast to the exemption of universities from *Charter* scrutiny, colleges were in that same year recognized as government branches and thus subject to *Charter* review in *Douglas/Kwantlen Faculty Assn. v. Douglas College* on the same question of mandatory retirement.²¹⁶ In this case, Chief Justice Dickson wrote for the majority that, unlike universities, Douglas College performed functions for the government, under direct supervision of the government and was thus less autonomous:

The college was a Crown agency established by the government to implement government policy...The government may permit the college board to exercise a measure of discretion but it not only appoints and removes the board at pleasure but also may at all times by law direct its operation. The college was performing acts of government in carrying out its function. The actions of the college in the negotiation and administration of the collective agreement were those of the government for the purposes of s. 32 of the *Charter*. It was quite unlike the universities which managed their own affairs.²¹⁷

Thus, the differentiation between the decision-making authority and discretion of the respective institutional governing bodies distinguished the relationships of universities and colleges to government and, accordingly, the application of the *Charter*.²¹⁸

Even though *McKinney* established long-standing precedent in excluding universities from *Charter* scrutiny, the split decision left some room for consideration of how the *Charter* could apply to some aspects of university activities. Dissenters in *McKinney* argued that, as universities had public functions, the *Charter* should apply to their activities and operations. Justice L'Heureux-Dubé argued in her dissent of *McKinney* for *Charter* application in some aspects of university activities:

Universities may not have all of the necessary governmental touchstones to be considered public bodies and yet neither are they wholly private in nature. Their internal decisions are subject to judicial review and their creation, funding and conduct are governed by statute. Some public functions performed by universities,

²¹⁶ *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at p. 3.

²¹⁷ *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570.

²¹⁸ Since this ruling, many colleges have transformed into universities, particularly in British Columbia, which begs the question of whether they have become "Charter-free" institutions that are entitled to academic freedom.

therefore, may attract *Charter* review.²¹⁹

Justice Bertha Wilson's dissent went even further to argue for broad application of the *Charter*. She offered historical context coupled with analysis of the purpose of universities and their contemporary roles in performing functions for government. Wilson J. maintained that universities are funded by governments to perform government functions, thereby necessitating their accountability to *Charter* standards. She wrote:

[T]he fact that the universities are so heavily funded, the fact that government regulation seems to have gone hand in hand with funding, together with the fact that the governments are discharging through the universities a traditional government function pursuant to statutory authority leads me to conclude that the universities form part of "government" for purposes of s. 32.²²⁰

She was opposed to the courts truncating rights and liberties secured in the *Charter*, and alternatively provided a more expansive interpretation:

To conclude that bodies that are in an arm's length relationship with the executive or administrative branches of government are automatically non-governmental would mean that a wide range of entities that are created but not controlled by the legislative branch of government would escape *Charter* review. This would hardly provide the kind of "unremitting protection" of rights and liberties that the *Charter* was meant to secure...²²¹

Wilson, J. disagreed that the principle of academic freedom and its ostensible relationship to institutional autonomy could be used to justify university exemption from the *Charter*. To the contrary, she argued that universities could maintain the necessary arm's length relationship from the government to protect academic freedom, which she narrowly defined as the "protection and encouragement of the free flow of ideas," while still operating in accordance with the *Charter*:

I accept...that the principle of academic freedom accounts for the absence of governmental intervention in some types of decisions...however, this argument does not really advance the universities' case for exemption from *Charter* review. Rather, it supports the view...that government must preserve an arm's length relationship with some types of bodies in order that they can perform their function in the best possible way. The essential function which the principle of academic freedom is intended to serve is the protection and encouragement of the free flow of ideas. Accordingly, government

²¹⁹ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at p. 21.

²²⁰ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at p. 158.

²²¹ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at p. 140.

interference in this realm is impermissible.²²²

In advancing this approach, Wilson J. recognized the need for institutional autonomy to shield universities from external interference while still maintaining their public accountability to protect human rights in the face of potential internal conflict. Justice Wilson further disputed the conflation of institutional autonomy with academic freedom – corresponding with the arguments made earlier by Finkin (1983)²²³ and later by Horn (1998):

While I believe that the principle of academic freedom serves an absolutely vital role in the life of the university, I think its focus is quite narrow. It protects only against the censorship of ideas. It is not incompatible with administrative control being exercised by government in other areas.²²⁴

After *McKinney*, the courts continued to provide disparate analysis on the *Charter's* application to universities while generally respecting a high degree of autonomy and discretion in their internal decision-making. For example, a lower court case in British Columbia recognized the autonomy of universities to administer their own policies and regulate their own principles of and limits on academic freedom.²²⁵

The *McKinney* decision was bittersweet for the academic community because, on the one hand, it recognized the importance of preserving a collegial structure for defining and upholding academic freedom and other scholarly values. The courts recognized that they were less likely to appropriately grasp scholarly principles than the academic community itself. However, on the other hand, some academics have been

²²² *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at p. 153.

²²³ Matthew W. Finkin, "On Institutional Academic Freedom" (1983) 61 Tex. L. Rev. 817-857.

²²⁴ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at p. 154.

²²⁵ See *Blaber v. University of Victoria*, 1995 CanLII 1220 (BC S.C.), *Ogden v. Simon Fraser University*, [1998] B.C.J. No. 2288.

unconvinced that recognizing *Charter* rights and freedoms in the university setting was incongruent with preserving collegiality or academic freedom in universities.²²⁶

While universities were left with broad discretion to manage their internal affairs and near immunity from *Charter*-related constitutional litigation after *McKinney*, the Supreme Court began to recognize the need to apply *Charter* scrutiny to certain activities carried out by non-governmental institutions on behalf of government – such as in the case of hospitals in providing health care. In 1997, in *Eldridge v. British Columbia*, the Supreme Court of Canada determined that the *Charter* does apply to hospitals when carrying out government policy by providing services on behalf of government.

The *Charter* applies to provincial legislation in two ways. Firstly, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it.²²⁷

This decision would later influence lower courts to consider what activities in universities, such as providing the service of post-secondary education, are delivered on behalf of governmental bodies.

The Changing Landscape of Higher Education in the Law

Even though universities are able to operate with broad discretion and autonomy, legal affairs and litigation have been steadily on the rise in many areas of university affairs – ranging from intellectual property, to governance, tort, privacy and information, administrative, human rights, and contract law. University decisions can be subject to judicial review when internal avenues have been exhausted, meaning that the courts can decide whether universities have followed a fair process for their administrative

²²⁶ Green, 2003; Smith 2000; Horn 1999.

²²⁷ *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. at p 626.

decisions, including those relating to students. Students are entitled to a high degree of procedural fairness through judicial review.²²⁸

While university activities may not be subject to *Charter* scrutiny, the Supreme Court has concluded that they are subject to human rights legislation. *University of British Columbia v. Berg*²²⁹ determined that students are members of the public who have the right to not be discriminated against based on mental health disability in the university context. The courts have also begun to assume a more commercial interpretation of the university's relationship to students, defining their commitment to students in terms of contractual obligations. But even in the context of contracts, a university's obligations to its students is limited to the terms stated in the contract, and not necessarily to institutional commitments to certain values or principles. For example, the BC Supreme Court determined that the principles of academic freedom in university policies do not translate to a contractual obligation to uphold academic freedom for students. In *Gray et al v. UBC AMS* the court rejected that the university had either contractual or constitutional obligations of academic freedom or other *Charter* freedoms to students:

[A]lthough the principles and spirit of academic freedom is fundamental to a university setting, it does not equate this concept into a contractual term, turning its enforcement and application into a contractual legal obligation.
For the purposes of this litigation, the plaintiffs accept that they have no constitutional rights to academic freedom, free expression or free association at UBC.²³⁰

But even though the courts do not guarantee students neither principles of academic freedom nor *Charter* protections in their relations with universities, university administrators are public officers, whose decisions are not only subject to judicial review,

²²⁸ *Khan v. University of Ottawa* [1997] OJ No. 2650.

²²⁹ *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

²³⁰ *Gray et al v. Alma Mater Society of the University of British Columbia et al*, 2003 BCSC 864 at para 89.

but could also be subject to the tort of misfeasance. In *Freeman-Maloy*,²³¹ the court ruled that the university president did have the authority to discipline students and that such actions were subject to judicial review, but not *Charter* scrutiny. It was further determined while a university president is not definitively a public officer, it was nonetheless appropriate for a president to appear in trial for the tort "misfeasance of public office."²³²

Following from *Freeman-Maloy*, students can now sue universities for monetary damages. The Ontario Court of Appeal recently allowed claims of breach of contract to be submitted in the cases of *Jaffer v. York University*²³³ and *Gauthier c. Saint-Germain*.²³⁴ In both cases, students sought damages from universities for what they identify as educational malpractice. Knelman explains the significance of these cases:

Students may have a claim for damages if it can be shown that the university did not deliver on its promises and if the allegations refer to behaviour that exceeds the jurisdiction of universities over their academic programs – in other words, if the students are not merely attempting indirectly to appeal a decision of an academic nature.²³⁵

There are implications with this growing trend of individual claims being filed by students against their university. Most notably, it is costly and can foster an adversary litigious and commercial culture on campus. As Gadja (2009) wrote in the American context, when the courts play a larger role in defining the rights and responsibilities of universities, it moves away from a model of self-governance and can impede academic freedom. She further critiques how increasing interaction between universities and the courts fuels the shift towards a corporatized approach to education delivery. She states:

²³¹ *Freeman-Maloy v. Marsden*, 2006 CanLII 9693 (ON CA).

²³² "Misfeasance of public office" is tort law regarding bad faith administrative decision-making.

²³³ *Jaffer v. York University*, 2009 CanLII 60086 (ON SC).

²³⁴ *Gauthier c. Saint-Germain*, 2010 ONCA 309 (CanLII).

²³⁵ Judith Knelman. "Court rules students may sue universities in some cases" (18 April 2012), *University Affairs* online: University Affairs <<http://www.universityaffairs.ca/court-rules-students-may-sue-universities-in-some-cases.aspx>>

The 'legalization' of academia is tied to its 'commercialization.' The more universities reach out to and reshape themselves in the model of commercial and other nonacademic enterprises, the more likely they are to be viewed by outsiders, including courts, as essentially like their nonacademic partners.²³⁶

Thus, Gadja argues that, as universities become inclined to act more as business outfits, their interactions with the courts are prone to increase. Within this corporate framework, individual rights and entitlements have the potential of coming into conflict with the broader pedagogical goals of the university. Given that university administrative decisions can significantly affect not only the academic experience of students, but also their long-term professional prospects, it is critical to consider how to properly protect students' rights to education and reinforce a university's obligation of their right to education, while avoiding the development a commercial and adversarial relationship between students and post-secondary education providers.

Developing Opportunities for *Charter* review in University Decisions

Administrative law is one of the legal avenues available to scrutinize aspects of student-university relations that are not immune from *Charter* analysis. While universities are subject to judicial review, there is an evolving body of jurisprudence revealing that elements of administrative activities can interact with *Charter*-related considerations.

Sossin (2010) argues that the Supreme Court has had some challenges negotiating the intersection of *Charter* scrutiny in administrative law but that there is movement towards reconciling these challenges. He states that, while non-governmental bodies are subject to public scrutiny through judicial review in administrative law, "discretionary authority always comes with an implied condition, which is that it be exercised in a manner consistent with all applicable Charter rights."²³⁷ For example,

²³⁶ Gadja, 2010, p. 16.

²³⁷ Lorne Sossin, "In Search of Coherence: The Charter and Administrative Law Under the McLachlin Court" A. Dodek and D. Wright, eds. *The McLachlin Court's First Ten Years: Reflections of the Past and Projections of the Future* (Toronto Lexis Nexis, Susan Gratton, 2010).

*Slaight Communications*²³⁸ affirmed that a public official, in exercising discretionary powers, must exercise these duties consistently with the *Charter*. But then later in *Little Sisters*,²³⁹ the Court acknowledged *Charter* violations in Customs operational policies but upheld the authority of Customs officials to assume these policies. Sossin explains the Court continued to demonstrate challenges determining when to employ administrative law standards and when to apply the *Charter*.²⁴⁰ While he argues there is a clear role for “administrative law analysis informed by *Charter* analysis,” he anticipates continued challenges for achieving a coherent and consistent approach. More recently, *Doré* further confirmed that administrative decision-makers “must remain conscious of the fundamental importance of *Charter* values.”²⁴¹

Sossin identifies a shift underway in reconciling administrative decisions with *Charter* analysis in *Greater Vancouver Transportation Authority v. Canadian Federation of Students*.²⁴² He states that a new functional approach has been introduced that helps to determine accountability in administrative decision-making when such activities raise questions of civil rights and freedoms. If administrative activities are indeed subject to *Charter* analysis, the courts may indeed have another avenue to interject into university

Online: SSRN <<http://ssrn.com/abstract=1911524>> p. 8.

²³⁸ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

²³⁹ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120, 2000 SCC 69.

²⁴⁰ Sossin reviews numerous SCC cases that consider the relationship between administrative law and *Charter* review, including *Slaight*; *Eldridge*; *R v. Morgentaler*, [1988] 1 S.C.R. 30; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120, 2000 SCC 69; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6.

²⁴¹ *Doré v. Barreau du Québec*, 2012 SCC 12 at para 54.

²⁴² *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31.

activities. In fact, this resurfaces in *Pridgen*, which is related specifically to the relationship between student discipline, administrative law, *Charter* freedoms, and due process.

Universities are not Charter-Free Zones, with Possible Exception in Alberta

The question of *Charter* application to student relations continues to be considered in Canadian courts. Most notably, the Alberta courts revisited the public duty of post-secondary education, accepting that university administrative decisions can be subject to *Charter* review – particularly in the face of provincial legislation that provides broad sweeping regulations for Alberta's universities and colleges. In *Pridgen v. University of Calgary*,²⁴³ the Alberta Court of Appeal considered the relationship between student discipline and the courts. While her decision was a minority decision, one of the three appeal judges agreed that an administrative decision maker must “properly [balance] its statutory mandate with the *Charter* right and its fundamental purpose.”²⁴⁴ The decision has been notable in reopening the question of what *Charter* activities may apply to universities while considering student rights and even academic freedom.

At issue in *Pridgen* was whether the discipline faced by two students was fair in both an administrative and *Charter* context. Keith and Steven Pridgen were faced with academic probation under a code of non-academic conduct, for negative comments against their professor in a Facebook group. When the review committee rejected their appeal of the university decision, the Pridgens filed for judicial review, claiming procedural unfairness and freedom of expression and association violations. The Alberta Queen's Bench and Alberta Court of Appeal agreed with them. The University argued

²⁴³ *Pridgen v. University of Calgary*, 2012 ABCA 139; *Pridgen v. University of Calgary*, 2010 ABQB 644.

²⁴⁴ *Pridgen v. University of Calgary*, 2012 ABCA 139, Judge A. Paperny at para. 126.

that the *Charter* should not apply because it would endanger institutional autonomy and academic freedom. At the Alberta Queen's Bench, Justice J. Strekaf determined that, given that the provincial *Post-Secondary Learning Act* outlined the statutory mandate of the institution, the University of Calgary was subject to *Charter* scrutiny in its administrative dealings with students. Justice Strekaf referred to both *Eldridge* and *McKinney* when concluding that the students could claim *Charter* violations. In doing so, she acknowledged the autonomous role of universities, yet noted their public duty to act for the government:

Universities may be autonomous in their day-to-day operations...however, they act as the agent for the government in facilitating access to those post-secondary education service contemplated in the PSL Act [*Post-Secondary Learning Act*].²⁴⁵

Drawing from *Eldridge* by comparing the relationship between hospitals and patients to universities and students, Strekaf J. further deemed that because post-secondary services were provided on behalf of the government, activities that could impact access to such services were subject to *Charter* scrutiny:

The University is the vehicle through which the government offers individuals to participate in the post-secondary educational system. When a university committee renders decisions which may impact, curtail, or prevent the opportunity to participate in learning opportunities, it directly impacts the stated policy of providing an accessible education system as entrusted to it under the PSL Act. The nature of these activities attracts *Charter* scrutiny.²⁴⁶

She further differentiated the university's role in disciplining students from its role as an employer in *McKinney*:

While the hiring and firing of employees by a university is non-governmental in nature...the disciplining of students and the placement of restrictions on a students' ability to exercise his or her freedom of expression in the context of pursuing an education at a public post-secondary institution is altogether different.²⁴⁷

²⁴⁵ *Pridgen v. University of Calgary*, 2010 ABQB 644 at para 63.

²⁴⁶ *Pridgen v. University of Calgary*, 2010 ABQB 644 at para 67.

²⁴⁷ *Pridgen v. University of Calgary*, 2010 ABQB 644 at para 68.

Given their government-like activities and the public interest in post-secondary education, Strekaf J. maintains that the interpretation and application of university administrative policies regarding student discipline must comply with the *Charter*.

I am satisfied that the University is not a *Charter* free zone. The *Charter* does apply in respect of the disciplinary proceedings taken by the University...While the University is free to construct policies dealing with student behaviour which may ultimately impact access to the post-secondary system, the manner in which those policies are interpreted and applied must not offend the rights provided under the *Charter*.²⁴⁸

Pridgen has since influenced another ruling in Alberta. *R v. Whatcott*²⁴⁹ concluded that the *Charter of Rights and Freedoms* applied to the University of Calgary and that Bill Whatcott, who was not even a student, had *Charter* protected rights, such as freedom of expression, on campus.

When the University of Calgary appealed to the Alberta Court of Appeal (ABCA) in *Pridgen*, the Association of Universities and Colleges in Canada (AUCC) and University of Alberta intervened. They argued that Judge Strekaf erred in her application of both *Eldridge* and *McKinney* and that services provided by hospitals are distinct from university activities, including student discipline, which they argue necessitate protection through institutional autonomy:

Student discipline is a core function of the university which is protected from external or governmental interference pursuant to the principle of institutional autonomy.²⁵⁰

AUCC argued that Judge Strekaf's conclusion that the University acts an agent of the government in providing a service to students is "antithetical to and inconsistent with

²⁴⁸ *Pridgen v. University of Calgary*, 2010 ABQB 644 at para 69.

²⁴⁹ *R v Whatcott*, 2012 ABQB 231. [Bill Whatcott was arrested on the University of Calgary campus after a complaint was made that he was distributing "anti-gay" pamphlets. He was subsequently released but barred from returning to campus for 3 months under the Alberta *Trespass to Premises Act*.]

²⁵⁰ *Pridgen v. University of Calgary*, 2012 ABCA 139 (Reply factum of the University of Calgary at para 8).

institutional autonomy and academic freedom.”²⁵¹ Referring to the AUCC’s newly revised statement on academic freedom, AUCC further warned that “a decline in institutional autonomy and academic freedom could impair the ability of Canadian universities to attract highly qualified professors and leaders.”²⁵²

The universities’ argument that *Charter* scrutiny would somehow interfere with academic freedom was criticized by the Canadian Civil Liberties Association (CCLA). The CCLA argued the universities’ equation of academic freedom with institutional autonomy “makes a mockery” of the principle and that “the Universities fail to recognize the importance of academic freedom to the students that make up an integral part of the university community.”²⁵³ CCLA further highlighted the contradictions in the Universities’ arguments around academic freedom and institutional autonomy:

Adopting an interpretation of institutional autonomy that permits university administrators to silence such expression while shielding their actions from *Charter* scrutiny on the grounds of either academic freedom or institutional autonomy makes a mockery of both concepts.²⁵⁴

CCLA warned that “an overly rigid understanding of institutional autonomy is the potential for abuse of power and coercion of members of that community.”²⁵⁵

The Alberta Court of Appeal upheld the decision, unanimously agreeing that the disciplinary process was not reasonable. However, the Court was split 2:1 on the question of *Charter* applicability. Judge Paperny was in the minority in agreeing with the

²⁵¹ *Pridgen v. University of Calgary*, 2012 ABCA 139 (Factum of the Intervener Association of Universities and Colleges in Canada at para 19).

²⁵² *Pridgen v. University of Calgary*, 2012 ABCA 139 (Factum of the Intervener Association of Universities and Colleges in Canada at para 22).

²⁵³ *Pridgen v. University of Calgary*, 2012 ABCA 139 (Factum of the Intervener Canadian Civil Liberties Association at para 13).

²⁵⁴ *Pridgen v. University of Calgary*, 2012 ABCA 139 (Factum of the Intervener Canadian Civil Liberties Association at para 19).

²⁵⁵ *Pridgen v. University of Calgary*, 2012 ABCA 139 (Factum of the Intervener Canadian Civil Liberties Association at para 15).

Queen's Bench that "there is no legitimate conceptual conflict between academic freedom and freedom of expression contained in the *Charter*."²⁵⁶ Rather, Judge Paperny argued that academic freedom and freedom of expression are "handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably exist."²⁵⁷

In her decision on the reasonableness of the administrative decision, Justice Paperny recommended that the University's review committee adopt a more broad set of criteria in making its disciplinary ruling. She proposed that included in such criteria could be "access to education, fostering an environment of open exchange and ideas, the prevention of incivility, intimidation, disrespect, and fear, and the fostering of a safe environment to discuss and debate contemporary issues within and among a diverse student body."²⁵⁸

In contrast to the current trends in Ontario, the ABCA decision on *Pridgen* demonstrates a more collective orientation to defining the relationship between students and universities. Judge Paperny explained that the student and administrative relationship in universities is more than a purely private or contractual matter, arguing that it has a public, or collective, dimension:

The relationship between a university and its students, at least when it comes to misconduct of a non-academic nature, has a public dimension that is missing in purely private situations. Student opinions about the quality of education they are receiving and comments regarding a particular course are of obvious interest to current and future students of the institution and to the standing of that institution in the academic world.²⁵⁹

Given the broad public interest in post-secondary education, *Charter* scrutiny serves both collective and individual interests. Judge Paperny added that the university acts

²⁵⁶ *Pridgen v. University of Calgary*, 2012 ABCA 139 at para 117.

²⁵⁷ *Pridgen v. University of Calgary*, 2012 ABCA 139 at para 117.

²⁵⁸ *Pridgen v. University of Calgary*, 2012 ABCA 139 at para 227.

²⁵⁹ *Pridgen v. University of Calgary*, 2012 ABCA 139 at para 108.

similar to a professional regulator in its ability to impact access to post-secondary education. Its power to deny such access can have serious consequences that could impact an individual in practicing in a chosen field.

It is important to note that, unlike other provinces, the *Post-Secondary Learning Act*²⁶⁰ in Alberta makes broad provisions for universities, including employee relations, student associations, student discipline, and other aspects of their governance and operations. In a substantively different approach to recent jurisprudence in Alberta, Ontario courts have been disinclined to apply *Charter* standards to the university administrative decisions, even since *Pridgen* and *Whatcott*.

Pridgen provides some advances for recognizing individual *Charter* rights for students, but it should not be expected to lead to a groundswell of *Charter* challenges across Canada. Ontario courts have continued to reject *Charter* claims related to student disciplinary proceedings, including arrests. For example, in *Lobo et al. v. Carleton University et al.*,²⁶¹ four Carleton University anti-abortion students filed claims against officers at Carleton University alleging violation of their *Charter* freedoms, including violation of 2(b); breach of university policy and procedures, including their student rights and responsibility policy; and tort damages for wrongful arrest. The respondent, Carleton University, successfully argued that claims of *Charter* violations be struck from the complaint. While the court acknowledged *Pridgen*, it did not apply because the *Carleton University Act*²⁶² confirmed the institution's autonomy from the provincial government.

²⁶⁰ *Post-Secondary Learning Act*, SA 2003, c P-19.5.

²⁶¹ *Lobo v. Carleton University*, 2012 ONSC 254.

²⁶² *The Carleton University Act*, 1952, S.O. 1952.

Similarly, in *Telfer v. University of Western Ontario*,²⁶³ a judicial review of a *Student Code of Conduct* disciplinary proceeding, the Ontario Superior Court refused to consider the student plaintiff's arguments for *Charter* protected expressive freedoms.²⁶⁴ Telfer, who at the time was the president of the Society of Graduate Students, was disciplined for behaviour that was considered harassment under the *Code of Student Conduct*²⁶⁵ when he engaged in heated debate with another graduate student regarding the Society's elections. Telfer claimed that he was denied procedural fairness when he was not allowed to be accompanied by legal counsel to the disciplinary hearings and that the definition of "harassment" in the *Code* violated his freedom of speech. Again, in dismissing the complaint, the court acknowledged *Pridgen* and *Whatcott*. However, it noted that University of Calgary had different obligations under the *Post-Secondary Learning Act*²⁶⁶ in Alberta, and that there was not similar legislation governing universities in Ontario.

In *Zhang v. University of Western Ontario*,²⁶⁷ the Ontario Superior Court of Justice did apply *Charter* consideration, concluding the University has administrative powers to discipline non-academic behaviour and to limit expression where such expression prohibited by the *Criminal Code*.²⁶⁸ Zhang, a first-year law student was suspended and subsequently expelled for repeated "gruesome" and "graphic" comments in class and on Facebook, which generated numerous complaints to the University. The

²⁶³ *Telfer v. The University of Western Ontario*, 2012 ONSC 1287.

²⁶⁴ This decision is currently being appealed.

²⁶⁵ The University of Western Ontario *Code of Student Conduct* (25 November 2010) Online: <<http://www.uwo.ca/univsec/board/code.pdf>>

²⁶⁶ *Post-Secondary Learning Act*, SA 2003, c P-19.5.

²⁶⁷ *Frederick Zhang v. The University of Western Ontario*, 2010 ONSC 6489 at para 35.

²⁶⁸ *Criminal Code*, RSC 1985, c C-46.

Ontario Superior Court of Justice, Divisional Court, upheld the University's disciplinary action, noting the limits to expressive freedoms on campus:

This court is mindful of the historical importance of encouraging free speech on university campuses, and rigorously defending the rights of students to debate difficult and often highly unpopular issues with passion. However, free speech has its limits, including the making of threats and defamation of character.²⁶⁹

The court determined that the University was able to exercise reasonable discretion and impose its own limits to expression in its disciplinary activities. Given diverging jurisprudence in Alberta and Ontario, there will continue to be dissonance with the application of the *Charter* in student discipline until there is an opportunity for the Supreme Court to decide on the matter.

When the *Post-Secondary Learning Act*²⁷⁰ was adopted in Alberta in 2004, it combined a series of university, college, and training acts in order to standardize various aspects of government relations with Alberta's post-secondary institutions, such as the management of student associations, collective bargaining provisions between academic staff and governing bodies, and student discipline as a method of advancing the concept of "Campus Alberta". It was at the time criticized for its implications to associational freedoms in higher education. Among the more contentious elements of the legislation were restrictions on the right to strike for academic employee associations, and the ability of the university to remove elected officers from student associations.²⁷¹ Given that the *Post-Secondary Learning Act* was criticized for violating

²⁶⁹ *Frederick Zhang v. The University of Western Ontario*, 2010 ONSC 6489 at para 35.

²⁷⁰ *Post-Secondary Learning Act*, SA 2003, c P-19.5.

²⁷¹ "Alberta Asserts New Powers Over Campuses," (June 2003) 50:6 *CAUT Bulletin*, online: http://www.cautbulletin.ca/en_article.asp?SectionID=295&SectionName=News&VolID=76&VolumeName=No%206&VolumeStartDate=6/1/2003&EditionID=15&EditionName=Vol%2050&EditionStartDate=1/1/2003&ArticleID=633.

associational freedoms, including the right to strike for employees, it will be interesting to see if *Pridgen* prompts other *Charter* challenges to the *Post-Secondary Learning Act*.

Conclusion

In reviewing the jurisprudence of post-secondary education in Canada, we can conclude that, while universities are granted significant deference and autonomy to manage internal affairs, some courts have determined that there are elements of student relations that are subject to different forms of legal scrutiny. Students have access to judicial review processes and human rights complaints, and in some cases tort law, to attempt to resolve grievances or seek remedies for decisions or activities that impede their access to education.

It seems broadly accepted that higher education serves a public function with the goal of fostering critical independence of mind – necessary for a free and democratic society. To this end, the federal government supports provinces through financial transfers for education, student financial support, research funding and other funds for post-secondary education. In spite of all of this, universities are operating more and more as private business-like corporations, moving away from collegial governance and towards a business model.

The courts are partially correct to grant deference and a high level of autonomy in university decision making because questions of academic freedom and quality of education are best determined in a collegial manner – with faculty, students, and administrators coming together to collectively determine the processes and principles. However, such commitments to collegial governance and resistance from undue external influence do not preclude universities from being required to uphold the highest standards of civil liberties and justice.

Because of their public functions, universities, like colleges should be considered government branches and subject to *Charter* scrutiny. Moreover, the courts ought to be careful to avoid narrowing the “unremitting protection” the *Charter* is supposed to guarantee. When certain sectors are carrying out activities that are clearly in the public interest, and supported by government to do so, the courts ought to attempt to apply *Charter* protection as broadly as possible. In doing so, universities may be more proactive in meaningful *Charter* recognition in the development and adoption of their policies.

A hyper-litigious atmosphere on campus is not ideal. The “legalization” of campuses is expensive, adversarial, and inappropriately narrows the relationship between students and post-secondary institutions. If university administrations continue to emphasize the role of student as consumers, students will continue to seek remedies as though they are consumers. If Ontario courts, and others continue to step away from recognizing the public function of post-secondary institutions and instead narrowly interpret the relationship between universities and students as one that is purely contractual, litigation could increase as a result. Not only would there be legal implications, but also pedagogical implications. The universities risk enabling a significant departure from fostering an academic freedom that promotes the freedom to teach and the freedom to learn.

An analysis of some relevant sections of the *Charter* can assist in framing fundamental conditions available for fostering a freedom to learn by advancing safeguards for student academic freedom in Canadian post-secondary institutions. And in establishing such assumptions, we can move to consider legislative, administrative and other conditions to assure public post-secondary institutions operate in the spirit of the *Charter*. I argue that broad associational and expressive freedoms must be affirmed in order to sustain the freedom to learn for fostering the critical thinking and

independence of mind pursuant to higher education. The next two chapters explore how associational and expressive freedoms can be deconstructed to support a framework for the freedom to learn in Canada.

Chapter 4: Freedom of Association for Students

Students bring to the campus a variety of interests previously acquired and develop many new interests as members of the academic community. They should be free to organize and join associations to promote their common interests.

AAUP Joint Statement on Rights and Freedoms of Students²⁷²

Students have organized in various capacities, bringing students together on a range of issues, events, clubs, and activities. Student collective action has also facilitated democratic engagement by securing representation and participation in collegial governance. As a relatively powerless group in the institution and society-at-large, students have organized together, to stimulate and inspire institutional, social, and political change.²⁷³ As students began to reject the *in loco parentis* relationship in the sixties, they sought greater autonomy and independence from administrative influence and interests. However, challenges for autonomous student organizing and for the independence of students' unions within the university community continue to emerge.

Academic instructors in Canada have also taken advantage of associational activities, many of whom unionized to protect aspects of their teaching and research. Thus academic staff have bolstered their collective voice both as certified labour unions and through associations that facilitate democratic engagement in collegial governance. Many scholars maintain that academic freedom for faculty is best secured through collective bargaining and formal negotiations securing such protections.²⁷⁴ Similarly, students have also secured representation in university governance, to form social, political, cultural, departmental, and athletic groups, and to provide a range of activities,

²⁷² American Association of University Professors et al, "Joint Statement on Rights and Freedoms of Students" (15 June 1967) online: American Association of University Professors <<http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm>>.

²⁷³ see for example Arthur, 2011; Horn 1998, 1999; Downs and Manion 2004; and Cohen and Zelnik, eds, 2002.

²⁷⁴ See Horn 1998, Thompson 2011.

services and advocacy on campus.²⁷⁵ Like faculty, students benefit from organizing together and using strength in numbers to advance their rights and share their interests in the academic community.

Students' unions are not protected with the same degree of security as labour unions. However, there are many crucial objectives for associating, including: broad protections for collective organizing, independent governance, dues collection, access to space to undertake activities, and membership provisions that ensure the security of the association. This is because their collective and independent organizing complements the formal educational activities by facilitating spaces for informal or self-organized avenues to explore their academic, cultural, artistic, political and scientific imaginations – serving to assist in developing independence of mind and exploration of principles, beliefs, understandings and expressions of the world. But just as labour unions are facing threats by governments and university administrations launching anti- trade union campaigns, these attitudes and efforts are extending to student unionism.

Canadian students experience generally widely-accepted yet precarious associational freedoms. In regions where statutory provisions have been established, such as in British Columbia and Quebec, there have recently been governmental efforts to undermine associational protections in post-secondary institutions in the face of political unrest.²⁷⁶ In fact, in Quebec, where exemplary legislation recognizing and accrediting student associations exists, a law was passed in haste to diffuse the 2012 student strike which directly threatens student union security. Outside of Quebec, attempts to destabilize dues security, prohibit or limit student collective activities (such

²⁷⁵ Student clubs and associations are a large part of student life. University of Toronto, for example, has over 400 student clubs – ranging from engineering groups, to dance groups, to political and environmental groups, to charitable, artistic, and religious groups.

²⁷⁶ See *An Act to enable students to receive instruction from the postsecondary institutions they attend* (L.Q., 2012, c. 12 / Laws of Quebec, 2012, chapter 12); and, *Advanced Education Statutes Amendment Act*, (RSBC 2011 Chapter 7).

as adopting more restrictive space booking policies or interfering with independent elections), and prevent access to membership lists have posed barriers and challenges for students' associations to reach their members. Already somewhat vulnerable by the transience of their elected officials, members, and staff, level of experience and institutional memory, securing resources are crucial to the viability of their democratic role in the university. Thus efforts to weaken student associations indicate a need to interrogate the relationship between campus associational freedoms and vibrant and democratic student engagement at post-secondary institutions.

Students require strong associational protections in order to carry out their collective activities and maintain their collective voice in the academic setting. As reviewed in the previous chapter, there are opportunities to expand the analysis of Canadian jurisprudence on the *Charter's* relationship to higher education, academic freedom, and general constitutional liberties. This chapter turns to a discursive analysis of principles of associational freedoms to identify how such freedoms support student organizing and, ultimately, their freedom to learn. It will also review the contemporary climate of student associational activities by examining some examples of governmental, institutional, and individual threats to destabilize student activities. It will further illustrate and conclude that students must continue to defend their collective voice, engage in direct democracy activities, and challenge unjust barriers to their associational freedoms.

Defining Freedom of Association

For decades, students in Canada have organized under the slogan "strength in numbers", emphasizing the value in collective action around common student interests. The extent to which their collective action has influenced civil society and higher education was recounted in Chapter 2. Joining groups, especially trade unions, is almost a given in any democratic society and has broad international recognition. Several

human rights conventions recognize the fundamental importance of associating for advancing political, economic, labour, religious and cultural interests necessary in a healthy and vibrant society. The *International Covenant on Civil and Political Rights*, of which Canada is a signatory, affirms in Article 22 the human right to associate.²⁷⁷ In Europe, Article 11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* recognizes Freedom of Assembly and Association.²⁷⁸ And in their policy on the right to organize and collective bargaining, the International Labour Organization's *Right to Organize and Collective Bargaining Convention* articulates the importance of upholding associational rights and their activities, particularly in the context of labour relations.²⁷⁹ In effect, the strength in numbers provided by associating offers opportunities for politically disempowered groups to mitigate power differentials by working together and sharing with each other common ideas, activities, interests, and goals. It can also be an impetus for social change.

Canadian jurisprudence recognizes that associating with others is fundamental to a fair and democratic society. In interpreting the purpose of the freedom of association clause (section 2(d)) of the *Charter*, McIntyre J. explained in the *Alberta Reference* that associating with others aids individuals in attaining their interests:

While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals,

²⁷⁷ *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 22. Online: <<http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>>.

²⁷⁸ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5; 213 UNTS 221, Article 11: Freedom of Assembly and Association, Online: <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=4/25/2006&CL=ENG>>.

²⁷⁹ *C98 Right to Organise and Collective Bargaining Convention*, 1949, Online: International Labour Organization <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098>> [Canada is a participant in the International Labour Organization].

through the exercise of individual rights, is generally impossible without the aid and cooperation of others.²⁸⁰

McIntyre J. further explained that section 2(d) was not intended to only protect associating in the labour context, but that associating was also necessary to achieve other activities or goals.

The purpose of freedom of association is to ensure that various goals may be pursued in common as well as individually. Freedom of association is not concerned with the particular activities or goals themselves; it is concerned with how activities or goals may be pursued.²⁸¹

Because working collectively bolsters the capacity for vulnerable groups to advance collective beliefs and interests, associational freedoms are interrelated to other fundamental freedoms – such as religion and conscience, and expression and assembly. In the United States, a 1958 case reviewing the right of individuals to collectively participate in political activities recognized that the right of association was inseparable from freedom of speech and critical for advancing beliefs and ideas.²⁸² Ideally, individuals should be able to enjoy membership in organizations and participate in their activities without fear of penalties, targeting, or retaliation – whether such penalties inhibit access to services, employment, or education. Along with the ability to belong to a group, associational freedoms must include the right to assume leadership roles, the right of a group to elect their own representatives, and the right to act as a representative without interference, surveillance, or retaliation. Individuals and groups must also enjoy the right to participate in associational activities, even when such activities are controversial or unpopular to those in power. Thus it is crucial that associating occurs with a level of autonomy from those in more powerful positions or direct interests.

²⁸⁰ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*Alberta Reference*”) at para. 152.

²⁸¹ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*Alberta Reference*”) at para 172.

²⁸² *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

Freedom of association is most effectively realized when it is interpreted positively as a collective right and includes the broad protection of an association's activities. As a collective right, member associations must be able to operate autonomously; collect dues and maintain association security; access member information; and, collectively organize without retaliation or external influence. In order to prevent external organizations from exerting influence over autonomous organizations or individuals participating in associative activities, legislative and administrative policies ought to adhere to and establish provisions to safeguard the broad principles of freedom of association. For example, federal and provincial corporate legislation should positively reinforce the autonomous right of its incorporated bodies and explicitly entitle organizations to access basic member information and to collect dues. Human rights and other legislation ought to protect individuals and groups who collectively associate for political, social, cultural and religious purposes. Finally, the rights of all associations, not exclusively labour unions, to carry out wide-ranging activities should be positively protected through legislation and statutes. However, as will be illustrated in this chapter, the Courts have been shortcoming in recognizing broad and robust safeguards for associating.

Student Organizing and Associational Activities

While there has been no joint declaration of student rights and freedoms in Canada comparable to the "Joint Statement on Rights and Freedoms of Students" in the US, students have clearly articulated the elements of their associational rights. The "Right to Organize" policy of the Canadian Federation of Students enumerates the activities required to safeguard student associational activities:

THE RIGHT TO ORGANIZE

All students have the right to organize and participate in democratic, autonomous student organizations which responsibly represent all students on their respective campuses.

All student organizations have the right to:

1. access their membership lists, including names, addresses, and telephone numbers;
2. incorporate, independent of the institution's administration;
3. access all technical services, such as printing services, audio-visual services, and computer services, which are available at the institution;
4. sufficient, on-campus office space without charge;
5. participate in political actions such as boycotts, walkouts, demonstrations or strikes without fear of recrimination;
6. have their fees collected by the administration when properly authorized by the student organization;
7. publicize their activities in reasonable places; and
8. independent media services.²⁸³

In most Canadian universities, students' unions operate autonomously, democratically, and are independently incorporated organizations, sometimes with their own subsidiary organizations. However, they all rely on university administrations to collect and remit dues and to provide information about their membership. As described by Horn (1998), many students' unions previously operated less autonomously from university administrations than today. However, elements of that paternalism, *in loco parentis*, remain. Many Canadian college student associations continue to vary in how independently they operate from college or university administrative control.²⁸⁴ Some students' associations perceive themselves more as "student governments" – a concept derived from the U.S. where student associations work much more closely as a branch of the college administration. These students' unions, such as the University Student Council of Western University, operate under an extensive corporate structure, which even includes a for-profit private component to the organization. However, the majority of Canada's students' unions identify much more closely with their unionism, seeking to defend students' rights and provide services and activities to support various aspects of the diverse student body.

²⁸³ Excerpt from the Canadian Federation Students "Declaration of Student Rights", Issues Policy, Canadian Federation of Students-(Services) online: <www.cfs-fcee.ca>.

²⁸⁴ Most university students' unions and colleges are autonomous, independently incorporated bodies; however, there are some college students' unions, particularly in Ontario that are managed directly by staff of the college.

Associational activities are essential to fostering a collegial structure in the contemporary university. This is because the collegial model offers a non-hierarchical and collaborative approach to university governance, which recognizes the university as a community of students and scholars. Associational freedoms have been fundamental to faculty realization of their academic freedoms to teach, publish, and research. Faculty in Canada rely on their right to associate and to collectively bargain to safeguard protections for academic freedom, tenure, and other provisions related to the integrity of the scholarly profession. The professional rights of academic staff to teach, research, and perform administrative and professional service free from influence and interference are best upheld through collective agreements. Student associations similarly provide a collective voice to advocate for quality learning conditions and critique university policies that affect their academic and non-academic campus experience. Collective bargaining models have – at times - been utilized by students' unions to negotiate with university administrations for certain university policies or agreements affecting student relations. This tradition of unionism and syndicalism has been even more effectively asserted in Quebec, where students have a long history of employing general strikes as an important tactic for achieving leverage in pressuring the government on student policy. Outside of Quebec, such forms of direct action have also been successfully employed to affect policy, such as in the 1995 protests in Ontario against the implementation of Income Contingent Student Loans Programs.²⁸⁵ But the public protest is only one of many activities under the rubric of how students' unions participate in collective organizing. Students union activities range from holding events on campus to running independent elections, running social and political campaigns, inviting speakers, participating in university governance, operating services, peer counseling, academic

²⁸⁵ Alan Sears, *Retooling the Mind: Education in a Lean State* (Toronto: University of Toronto Press, 2003).

advocacy, and encouraging political engagement. Like labour unions, students' unions require autonomy and security to undertake their activities, without retaliation or interference by the government or administrators.

Students need organizational security to carry out their activities effectively and democratically. Given their highly transient membership base, along with dramatic power differentials between students and administrations, a secure organizational base is crucial. The principle of the Rand Formula, accepted by the courts for labour union dues security, is generally adopted in the context of mandatory fee collection for students' unions.²⁸⁶ This is because students collectively benefit from the work of the students' union, both its advocacy and services, and can participate in shaping its direction through its democratic structure. Furthermore, students' unions may initiate campaigns or policy proposals that are unpopular, critical of, or otherwise disliked by university administrators or other powerful decision-makers, which can lead to efforts by the administration or others to attempt to destabilize those democratic activities by going after the resources of the students' union. Therefore, dues security offers the conditions to strengthen the mobilization capacity of students who, individually, are relatively vulnerable. However, the security for such activities is disparate across the regions in Canada.

Despite some common characteristics between student and faculty associations, faculty in their status as employees reasonably enjoy greater security for associational protections through provincial and federal labour legislation and statutes requiring due process, union security, and collective bargaining. Statutory provisions for students' unions exist in a minority of provinces, enabling more stable access to their membership dues and membership lists. Students' unions in most other provinces are more

²⁸⁶ Not all student group fees are mandatory and vary from one association to the next. Many students have decided, usually through referenda, to allow for the ability to opt out of certain levies, such as women's centres, public interest research groups, and day cares.

vulnerable to provisions in university policy or administrative discretion – which vary from one campus to another in their implementation and enforcement. As will be further discussed, Quebec's accreditation laws can be considered a model for student association legislation. However, the implementation of "Bill 78"²⁸⁷ illustrated that even in those provinces where recognition has been achieved in legislation, such protections are never completely secure in the face of political dissent. Unfortunately, as the next sections illustrate, associational activities have dismal protection in Canada, meaning that students will have to continue to proactively defend their current associational activities and continue to seek legislative protections.

Canadian Right to Associate Jurisprudence

Through its freedom of association provision, the *Charter* recognizes the right of individuals to form and belong to organizations, including those with political, religious, and social purposes. *Charter* jurisprudence also recognizes the importance of union security. But these protections seem to be precarious and inconsistent. Many have argued that section 2(d) jurisprudence has provided only minimal advancements in upholding associational rights as a fundamental freedom.²⁸⁸ While the courts have rhetorically recognized the democratic functions of "strength in numbers" through collective organizing and the positive right to associate, meaningful protections for associational activities are largely absent in the jurisprudence, making contemporary anti-union attacks of particular concern. This will be illustrated in the following sections.

²⁸⁷ *An Act to enable students to receive instruction from the postsecondary institutions they attend* (L.Q., 2012, c. 12 / Laws of Quebec, 2012, chapter 12).

²⁸⁸ J. Fudge, "Labour Is Not a Commodity: The Supreme Court of Canada and the Freedom of Association" (2004) 67 Sask. L. Rev. 425; T. Sheppard, "Liberalism and the Charter: Freedom of Association and the Right to Strike" (1996) 5 Dalhousie J. Legal Stud. 117.

Limitations on Associating

Before moving to outline labour jurisprudence in section 2(d), it is important to note that associational freedoms are intended to extend beyond labour unions. Unfortunately, jurisprudence on associational freedoms in non-labour organizations is dismally scarce. While the freedom to associate is protected in the *Charter*, not all types of associating are covered. For example, associating for sexual purposes between two consenting adults,²⁸⁹ or for commercial relationships²⁹⁰ are not protected under section 2(d). *Suresh v. Canada*²⁹¹ further confirmed that the right of association did not apply to all associations, in that an individual may not have the right to belong to a group that poses a threat to national security or to engage in violence.

First Trilogy and Beyond: The Right to Associate but not to Associational Activities

In many ways, early section 2(d) jurisprudence fell short of substantively protecting associations and their activities. Although individuals can form or belong to an organization, the Supreme Court of Canada's first decisions on associational freedoms did not confirm protection for associational activities. Known as the "trilogy 'right to strike' cases" considered by the Supreme Court in 1987, *Alberta Reference*, *R.W.D.S.U.*, and *P.S.A.C.*, failed to uphold the right of public sector employees to collectively bargain or strike.²⁹² The *Alberta Reference* set the stage for narrow interpretations of Section 2(d).

²⁸⁹ *R. v. Skinner* [1990] 1 S.C.R. 1235.

²⁹⁰ *Canadian Egg Marketing Agency v. Richardson* [1998] 3 S.C.R. 157.

²⁹¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1.

²⁹² *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38, D.L.R. (4th) 161 [*Alberta Reference*]; *R.W.D.S.U., Locals 544, 496, 635, 955 v. Saskatchewan*,

While the right to associate was a fundamental freedom, an association's activities were not protected:

The rights for which constitutional protection are sought--the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer--are not fundamental rights or freedoms.²⁹³

The dissent argued that labour union activities were essential to support the goals of vulnerable peoples in achieving equity:

s. 2(d)...must extend beyond a concern for associational status in order to give effective protection to the interests to which the constitutional guarantee is directed and must protect the pursuit of the activities for which the association was formed...²⁹⁴

A few years later, the Supreme Court confirmed in *PIPSC* that collective bargaining, in addition to the right to strike, was not protected by the *Charter*.²⁹⁵ Because of these early decisions, scholars have argued that the section 2(d) jurisprudence is a "mess" now plagued by decades of unprincipled rulings which established wrongheaded conceptions of individual and collective rights and a dismissal of international human rights standards.²⁹⁶ In the first labour trilogy, the Supreme Court revealed its tendency to conservatively affirm minimal protection for labour unions, ruling that section 2(d) safeguards associational rights but maintains the *status quo* by neglecting to protect union activities and equality among workers.

[1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277.; and, *P.S.A.C. v. Canada (A.G.)*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249.

²⁹³ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38, D.L.R. (4th) 161 [*Alberta Reference*] at p. 316.

²⁹⁴ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38, D.L.R. (4th) 161 [*Alberta Reference*] at p. 317.

²⁹⁵ *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.

²⁹⁶ Langille, 2009.

In 2007, in *BC Health*,²⁹⁷ improved upon these earlier rulings by overruling previous decisions which failed to protect collective bargaining:

Freedom of association guaranteed by s. 2(d) of the *Charter* includes a procedural right to collective bargaining...The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society, emerging as the most significant collective activity through which freedom of association is expressed in the labour context.²⁹⁸

While a significant step in the right direction, *BC Health* still provided limited advances in recognizing associational activities by continuing to shy away from explicitly protecting the right to strike and allowed government discretion to intervene in trade union activities.²⁹⁹

In 2011, Canadian labour jurisprudence took a regressive turn thereby limiting the collective bargaining rights of farm workers. *Ontario (Attorney General) v. Fraser* concluded that, while section 2(d) protected collective bargaining rights, these rights are limited and do not require a uniform collective bargaining process for all workers. The majority concluded that “what is protected is associational activity, not a particular process or result,”³⁰⁰ thus allowing for variance in collective bargaining provisions across work sectors. The above summary of jurisprudence on associational activities reveals that the Supreme Court has a history of cautiously interpreting associational freedoms. Collective bargaining and the right to strike are barely protected. As public sector wage freezes continue to be legislated, along with other anti-worker activities, it will be important for workers to find ways to assert robust protection for associational activities.

²⁹⁷ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27, [2007] 2 S.C.R. 391, 283 D.L.R. (4th) 40.

²⁹⁸ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27, [2007] 2 S.C.R. 391, 283 D.L.R. (4th) 40 at p. 393.

²⁹⁹ Such limitations are frequently applied utilizing “back to work” legislation, lock outs, and by identifying certain types of work as essential services.

³⁰⁰ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

Union and Dues Security

Not only are associational activities such as collective bargaining and picketing necessary for facilitating power redistribution between workers and employers, but organizational security is also crucial. While the court has generally been divided on the right not to associate, it has upheld compulsory trade union dues as an important component of union security. In 1991, the SCC recognized union security in *Lavigne v OPSEU*.³⁰¹ *Lavigne* required the Court to consider the constitutionality of the Rand formula - a method for collecting union dues, using the principle that an employee would still benefit from the union's work even if she or he did not pay union dues. More specifically, *Lavigne* was disputing the constitutionality of mandating dues unrelated to collective bargaining. La Forest, J. writing for the majority justified the Rand formula:

Dues are used to further the objects of the Union, and are essential to the Union's right to "maintain" the association, an aspect of the freedom to associate recognized under s. 2(d) of the *Charter*.³⁰²

La Forest, J. further articulated the social and political importance of unions in civil society:

The state objectives in compelling the payment of union dues which can be used to assist causes unrelated to collective bargaining are to enable unions to participate in the broader political, economic and social debates in society, and to contribute to democracy in the workplace...An opting-out formula could seriously undermine the unions' financial base and the spirit of solidarity so important to the emotional and symbolic underpinnings of unionism. [emphasis added]³⁰³

As we shall see later in this chapter, group rights, union security, and mandatory fees are significant and sometimes controversial issues for students' unions in Canada, and

³⁰¹ *Lavigne v. Ontario Public Service Employees Union*, [1991 2 S.C.R. 211, 81 D.L.R. (4th).

³⁰² *Lavigne v. Ontario Public Service Employees Union*, [1991 2 S.C.R. 211, 81 D.L.R. (4th) at p. 212.

³⁰³ *Lavigne v. Ontario Public Service Employees Union*, [1991 2 S.C.R. 211, 81 D.L.R. (4th) at p. 214.

from time to time become the target of affronts by individuals or groups pushing for voluntary student unionism.³⁰⁴

Second Trilogy: Establishing Group Rights

Following several disappointing decisions of the 1st trilogy that upheld meager protections for associating, while falling short of protecting associational activities, the second labour trilogy offered minor improvements by recognizing guarantees for justifying compelled association. Cameron (2002) argues that the first trilogy had interpreted associational rights as “individual” in nature, rejecting the notion that there was a “collective” guarantee embedded in section 2(d). The second trilogy,³⁰⁵ on the other hand, indicated and established a positive obligation for the government to protect section 2(d) of the *Charter* and further recognized the importance of interpreting associational freedoms as a collective right.

With *Dunmore v. Attorney General (Ontario)*,³⁰⁶ the Supreme Court recognized that governments could indeed have a positive obligation to protect associational freedoms. Bastarache, J., writing for the majority, concluded that the purpose of section 2(d) was to advance “the collective action of individuals in pursuit of their common goals.”³⁰⁷ He argued that agricultural workers could not enjoy the freedom to associate without legislation protecting this freedom. Even though *Dunmore* affirmed a limited positive obligation by governments to protect joining a union, it still avoided recognizing substantive protection of

³⁰⁴ See for example, Frontier Centre for Public Policy, “Let’s Abolish Compulsory Membership in Student Unions” (23 November 2011) online: Frontier Centre for Public Policy <<http://www.fcpp.org/publication.php/3974>>.

³⁰⁵ *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, 2001 SCC 70 (2001); *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94; and, *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8.

³⁰⁶ *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94.

³⁰⁷ *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 at p. 1039.

associational activities by maintaining that neither collective bargaining nor the right to strike was *Charter* protected activity.

Also notable in the second trilogy was confirmation of the importance of compelled association and group rights in securing strength in numbers necessary for advancing collective interests. In *R v. Advance Cutting and Coring Ltd.*,³⁰⁸ the Court upheld Quebec legislation requiring construction workers to be a member of a labour union. The decision was badly split, however, indicating continued discord on the right to *not* associate. The law was ultimately upheld because Iacobucci, J. concluded that, while the law did violate 2(d), it was justifiable under s. 1. L'Heureux-Dubé, J. explained in her concurring decision against the right not to associate:

Negative rights are viewed as individual rights embodying individual goals: an individual is given the constitutional right not to belong to an association. If the fundamental purpose of freedom of association is to permit the collective pursuit of common goals, then the very concept of a "negative freedom of association" becomes suspect. The collective pursuit of "common goals" in such a context leads to an abstraction which is difficult to justify.³⁰⁹

She added that at the core of the principle of association was a positive obligation to engage in democracy:

Democracy is not primarily about withdrawal, but fundamentally about participation in the life and management of democratic institutions like unions.³¹⁰

The final 2nd trilogy case, *R.W.D.S.U. Local 558 v. Pepsi-Cola*,³¹¹ further recognized protection for some associational activities, such as picketing, as they are related to expressive freedoms. This case recognized picketing as a critical method by which unions publicly convey their message about a particular dispute or issue, but did

³⁰⁸ *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70.

³⁰⁹ *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70 at para 67.

³¹⁰ *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70 at para 207.

³¹¹ *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8.

so under section 2(b) – freedom of expression. As long as the picketing is neither criminal nor tortious, it is protected expressive activity. Overall, the 2nd trilogy marked notable improvements to associational protections for trade unions. However, protection for associational activities are still less robust than ideal.

The Weak Patchwork of 2(d) Jurisprudence

Section 2(d) jurisprudence leaves a patchwork of constitutional protections for associating, focusing mainly on union membership and falling short of protecting associational activities. The jurisprudence at a minimum recognizes the critical role of associating in a fair and democratic society – from fostering fair and equitable political, social and economic engagement to supporting traditionally vulnerable groups to advance common interests. However, there is significant concern that associational protections are under further threat with a current trend of labour and trade union law changes underway in Canada. For example, constitutional challenges in Saskatchewan are underway regarding changes to the labour legislation that modify both the certification process and collective bargaining rights.³¹² In Ontario, under the rationale of austerity, legislation retracted collective bargaining rights for teachers in order to ensure wage freezes³¹³ and subsequent efforts to implement broad public sector wage freezes culminated in the prorogation of the provincial government. At the federal level, amendments to the *Income Tax Act* adopted by the House of Commons introduce new disclosure requirements for labour organizations.³¹⁴ Labour unions warn that these new

³¹² See *Saskatchewan v. Saskatchewan Federation of Labour*, 2012 SKQB 62, which reviews *The Public Service Essential Services Act*, S.S. 2008, c.P-42.2 and *The Trade Union Amendment Act 2008*, S.S. 2008, c. 26 and c. 27. Two appeals are underway to this decision.

³¹³ Bill 115, *Putting Students First Act*, 2012: Royal Assent received Chapter Number: S.O. 2012 C.11. Legislative Assembly of Ontario.

³¹⁴ Bill C-377 *An Act to amend the Income Tax Act* (requirements for labour organizations). First reading in the Senate 2012-12-13.

provisions intend to dramatically weaken their role by requiring them, under the auspices of accountability and transparency, to expend significant resources to disclose internal financial information. Larry Rousseau of the Public Service Alliance of Canada has charged that the amendments would “burden labour organizations with endless and costly paperwork...in the hope that this will distract unions from fighting the absurdly long yet ever-growing list of excesses and abuses by the Harper regime.”³¹⁵ As anti-union sentiments seem to be pervading among governments, many of these activities are perpetuated in the higher educational sector, both targeted towards labour unions and students’ unions. This next section explores some of these issues in relation to the activities of students’ unions in Canada.

Associational Freedoms on Canadian Campuses

With the trend of the casualization of academic labour, union security is also facing challenges on Canadian campuses. Students’ unions are also experiencing similar strains on their associational activities. University administrations have been accused of actively resisting unionizing of certain groups of employees. Most recently such resistance has been met in the unionization of post-doctoral fellows, although Canadian courts are beginning to rule in favour of their right to unionize.³¹⁶ Philips-Fein (2004) describes how strategic and methodic anti-union activities are undertaken by university administrators in the context of graduate employee unions in the United States. She explains that administrations solicit advice from anti-union law firms on anti-union strategies, including efforts to justify communicating to members against

³¹⁵ Larry Rousseau. “Bill C-377: Transparently Anti-Union,” (1 November 2012) *Huffington Post*, online: *Huffington Post* <http://www.huffingtonpost.ca/larry-rousseau/harper-union_b_2051742.html>

³¹⁶ *Canadian Union of Public Employees v Governing Council of the University of Toronto*, 2012 CanLII 1673 (ON LRB).

unionization. She further explains how anti-unionizing tactics include the administrative role of supporting anti-union students in their counter-organizing.³¹⁷

Little documentation accounts for the creeping opposition to students' unions in Canada. Students' unions in Canada have largely adopted a trade union model for organizing, notably in Quebec. And thus, many of the criticisms of trade unions are similarly launched against students' unions. The formation and structure of students' unions follow the model of trade unions, including union security, collective action, dues collection, the right to participate in an association and its activities, and the right to operate autonomously from administrative control. These associations are largely acknowledged in legislation, whether such legislation exists in unique university acts or broader provincial legislation regulating aspects of post-secondary education or student associations. However, students' union security is disparate across Canada. This next section analyses those legislative and institutional provisions related to student associations. It will deconstruct elements of some legislative frameworks and consider how, at times of political dissent, even legislation may not serve to protect students' unions from retaliation against political dissent.

Students' Union Security: Mandatory Fees

Union security is necessary for students' unions and other student societies, especially in the context of withering collegial governance and increasing corporate interest exerting political pressure on campus. Practically, university administrations have to cooperate in dues collection and remittance. This has generally occurred in Canadian universities – either reinforced by institutional operational policies or provincial legislation. Post-secondary institutions collect a range of compulsory non-academic fees,

³¹⁷ Kimberly Philips-Fein. "What is a University? Anti-Union Campaigns in Academia" Jim Downs and Jennifer Manion (eds.), *Taking Back the Academy! History of Activism, History as Activism*. (London: Routledge, 2004) at 78.

such as athletic fees, and others are collected on behalf of, and remitted to, student associations. Mandatory students' union dues provide the necessary stability for students' unions to provide a range of social and political activities and services. Sometimes, portions of these fees have an opt-out component, such as health and dental fees, and some other student group fees. But by and large, the central students' union fee in Canada is mandatory. As already noted, the Supreme Court recognized the importance of union security in the labour context *Lavigne*:

Dues are used to further the objects of the Union, and are essential to the Union's right to "maintain" the association, an aspect of the freedom to associate recognized under s. 2(d) of the *Charter*.³¹⁸

Every so often, proposals for voluntary students' union membership and dues surface in the media, by individual students, or by university administrators.³¹⁹ Some Canadian university administrations have attempted to amend student society fee collection policies to require students' unions to modify their bylaws or constitutions to allow for students to voluntarily withdraw from their central students' unions. When the University of Toronto Provost attempted to introduce this discussion in 2008, students' unions and campus labour unions came together to publicly oppose the efforts as "veiled union-busting."³²⁰ Students have also come forward to challenge mandatory student unionism. Currently, a student at University of Ottawa has initiated a legal challenge to mandatory

³¹⁸ *Lavigne v. Ontario Public Service Employees Union*, [1991 2 S.C.R. 211, 81 D.L.R. (4th) at p. 212.

³¹⁹ See for example, Frontier Centre for Public Policy, "Let's Abolish Compulsory Membership in Student Unions" (23 November 2011) online: Frontier Centre for Public Policy <<http://www.fcpp.org/publication.php/3974>>; Katherine DeClerq, "University of Ottawa student challenges mandatory student union membership in lawsuit" (14 June 2012) *Canadian University Press*, online: Canadian University Press <<http://cupwire.ca/articles/52835>>.

³²⁰ "Provost's Advisory Committee Suspended: Students Given Ultimatum to Declare Participation" 4 December 2008, *The Varsity*, online: The Varsity <<http://thevarsity.ca/articles/6300>>.

membership in the Student Federation of the University of Ottawa.³²¹ Two students at Université de Laval have also legal proceedings challenging Quebec's student association accreditation law.³²²

U.S.: Mandatory Student Fees Support the Public Forum

American courts have more extensive case law around student fees, attempting to mediate conflicting perspectives between group associational rights within a constitutional framework that places a strong emphasis on the individual right of free speech. In fact, the issue has been so significant that that the Centre for Campus Free Speech (CCFS) created a legal reference guidebook summarizing the case law affirming mandatory student activity fees.³²³ The CCFS argues that extracurricular student-funded activities provide students with opportunities to engage in experiential learning outside the classroom; community service; and, religious, social and political activities - all contributing to the fabric of the academy. Thus, pooling financial resources through the collection of dues enables students to participate more fully in their campus environment. The CCFS argues that efforts to destabilize student fee collection in the United States attack the 1st Amendment-protected speech rights of students. Further, not only does interference in student fee collection represent an encroachment on constitutionally protected freedoms, but it also contradicts the very purpose of the university:

³²¹ Katherine DeClerq, "University of Ottawa student challenges mandatory student union membership in lawsuit" (14 June 2012) *Canadian University Press*, online: Canadian University Press <<http://cupwire.ca/articles/52835>>.

³²² "Deux étudiants contre l'adhésion automatique à une association étudiante," (23 January 2013) *Radio Canada*, online: Radio Canada <<http://www.radio-canada.ca/regions/quebec/2013/01/23/007-laurent-proulx-requete.shtml>>. (Laurent Proulx and Miguael Bergeron launched a *Charter* challenge against mandatory student union membership in *An Act respecting the accreditation and financing of students' associations*. R.S.Q., chapter A-3.01).

³²³ "Guide to Student Activity Fees", Centre for Campus Free Speech, online: Centre for Campus Free Speech <www.campuspeech.org>.

These opponents of student fee funded activities have taken the position that they would rather sacrifice the whole forum that student fees fund than tolerate a forum that contains views other than their own. Religious conservatives have been among the most vigorous objectors to the broad range of student fee funded activities, though there are other groups in that camp as well.³²⁴

Despite several decades of contradictory case law on the constitutionality of mandatory student activity fees, the U.S. Supreme Court affirmed in 2000 that mandatory student fees were constitutional where such student activities provided a “public forum” integral to the purpose of universities. In *Board of Regents of the University of Wisconsin System v. Southworth*, the U.S. Supreme Court upheld the constitutionality of mandatory student fees, arguing that the mission of the university is well served if “students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.”³²⁵ The ruling introduced the concept of “viewpoint neutrality” in consideration of mandatory student activity fees, meaning that all viewpoints of student speech must be protected, even those that are controversial, and be granted equal consideration to funding.³²⁶ According to this perspective, students’ unions facilitate a “public forum” for students, thereby serving the purpose of higher education. The “public forum doctrine” in the United States recognizes that the freedom of speech guarantee in the First Amendment includes the right to use public spaces for expression and association, including the right of student organizations to book university space for their activities.³²⁷

³²⁴ “Guide to Student Activity Fees”, Centre for Campus Free Speech, online: Centre for Campus Free Speech <www.campuspeech.org> at p. 4.

³²⁵ *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) at p. 218.

³²⁶ It is important to note that viewpoint neutrality does not require that all viewpoints are required to be funded, just that they must be considered for funding in the same process.

³²⁷ *Widmar v. Vincent*, 454 U.S. 263 (1981).

Voluntary Student Unionism in Australia and New Zealand

While the U.S. courts have recognized the validity and constitutionality of mandatory student fees and the right of students to associate in university spaces, some nations have taken regressive steps away from student associational security by legislating student union voluntarism, thereby eradicating mandatory students' union fees. Student union voluntarism makes membership in a students' union optional, requiring students to opt-in to joining and paying fees. In Australia, where there is no constitutional guarantee of the freedom to associate, students' unions became significantly destabilized when federal legislation was adopted prohibiting compelled association. In 2006, voluntary student unionism was federally legislated in Australia, representing a major blow to students' union activities and services.³²⁸

Commonly, proponents of voluntary student unionism argue that students' unions are not genuinely representative and that they tend to lean too far to the left politically or participate in political activities that are not representative of the entire student body.³²⁹ The Frontier Centre for Public Policy, for example, criticizes students' unions support for a range of projects and programs, such as lesbian, gay, bisexual, and trans support centres, women's centres, campaigns on climate change, racism, and women's issues fail to represent the interests of all students. However, it is important to note that youth as a demographic tend to be more favorable to left-leaning political parties.³³⁰

³²⁸ *Higher Education Support Act 2003* (section 19-37). Government of Australia. Online: <<http://www.comlaw.gov.au/Series/C2004A01234>>

³²⁹ Chris Barton "Students pay high price for freedom" (18 December 2010) *New Zealand Herald*. Online: New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10695053>; Frontier Centre for Public Policy, "The Case for Voluntary Student Unionism" (November 2011) Backgrounder No. 96, Frontier Centre for Public Policy, online: Frontier Centre for Public Policy <<http://www.fcpp.org/publication.php/3973>>.

³³⁰ Lisa Young and William Cross. "A Group Apart: Young Party Members in Canada Charting the Course for Youth Civic and Political Participation" (2007) Research Report for the Canadian

Additionally, students' unions undertake transparent and sometimes extensive deliberative processes for the development of their campaigns and other priorities. Generally, they provide support and funding for a range of clubs, events, and campaigns that are developed democratically by the student body. Finally, other members of the university community, from university presidents, to faculty and staff associations, engage in various types of political activities and engage in government relations.³³¹ It is problematic for either governments or administrations to attempt to interfere with student collective participation in political and civic engagement, regardless of whether positions advanced by students are seen to be unfavorable to university presidents or government officials.

Voluntary Student Unionism: Hindering Student Political Engagement

While attempting to demonize students who engage in political activity, proponents of voluntary student unionism further underplay the significance of the role of student associations in the university community. In Australia, students and faculty both warned of the dangers an opt-in model would pose for the university community at large. In 2005, an Australian university professor warned of how voluntary student unionism would hinder the democratic engagement of students in universities:

Voluntary student unionism threatens to destroy the viability of student unions, and thereby much of the richness and diversity of the traditional university experience in Australia...Ultimately, it is in the interests of maintaining the quality of Australian universities that viable student unions be encouraged, and it is difficult to see the

Policy Research Network and Elections Canada. Online: Canadian Policy Research Network <www.cprn.org>.

³³¹ Association of Universities and Colleges in Canada. "Canada's university presidents bring prosperity message to Parliamentarians" (23 October 2012) News Release. Online: Association of Universities and Colleges in Canada <www.aucc.ca> [*The media release describes that the annual lobby day for university presidents would "focus on university and private sector partnerships and how they drive innovation, foster global linkages and contribute to a stronger Canada." It further articulates that the AUCC would be bringing private sector partners to its lobby meeting.*]

abolition of compulsory student union fees as doing anything else than dramatically weakening the quality of university education in Australia.³³²

After the legislation came into effect, a 2008 study reported that the legislation did indeed have measurable negative and harmful consequences on campus life. The resulting millions of dollars in funding cuts severely affected campus groups and core student services maintained by students' unions including a reduction in athletics, recreational, social and cultural activities.³³³ The elimination of mandatory students' union fees had such a negative impact on campus life that the Australian government had to inject a \$500 million transition fund to aid universities in attempting to resuscitate the services and programming previously provided by campus students' unions. Political pressure to amend the Australian legislation persisted and, in November 2011, a new Bill passed that allowed universities to charge compulsory fees for the implementation of student programming and services. However, the law continued to prohibit compulsory union membership and the use of such fees to resource any political activities.³³⁴ Furthermore, the fees are levied by the university administration to determine and disburse taking the autonomy away from students to operate their own independent services with security. While the reintroduction of compulsory fees is a small step in the right direction, limiting the funding of political activities still obstructs the associational and expressive activities of students in Australia. The discouragement of associated political activity among students and youth, in particular, is more than a violation of free

³³² Judy Page. "A Creative Solution to the Dilemma of Voluntary versus Compulsory Student Union Fees" (Jul-Aug 2005) 77:4 AQ: *Australian Quarterly* 19-21, 40.

³³³ *Voluntary Student Unionism (VSU) Impact Study* (2008) Jointly commissioned by ACUMA Incorporated and Australian University Sport, Online:
<http://www.acuma.org.au/resource_library/vsu/vsu_impact_study/index.htm>

³³⁴ *Higher Education Legislation Amendment (Student Services and Amenities) Act 2011*
- C2011A00130 Date of asset: November 3, 2011, Australian Government, online:
<<http://www.comlaw.gov.au/Details/C2011A00130>>.

speech and association. It further alienates an already disenfranchised voter demographic from engaging in civil and political discourse.

In September 2011, the *Voluntary Student Membership Bill* was adopted in New Zealand, much to the upset of students' unions, faculty, and other campus student service providers.³³⁵ Several students' unions have ceased operations in New Zealand as a result of the legislation. Other students' unions have kept afloat where university administrations have agreed to work around the legislation by increasing course fees and remitting a portion of those fees to the students' unions to continue operating.³³⁶

Political Engagement and Associating

The attack on students' unions in Australia and New Zealand can be interpreted as a hindrance to youth participation in democratic practices and collective organizing, particularly among an already disempowered and disenfranchised demographic. In Canada, Elections Canada has documented low youth voter turnout in various levels of government elections.³³⁷ Students' unions have played major roles in promoting youth voter engagement by advocating for campus polling stations, hosting candidates' forums, and raising awareness about party platforms on education and research, public transit, and the environment. Many students' unions undertake educational campaigns to engage students in contemporary political issues and provide resources and tools to further engage students in democratic activities – including specific educational

³³⁵ Education (Freedom of Association) Amendment Act 2011, Public Act, 2011 No. 80. Government of New Zealand, Date of Assent: September 30, 2011. Online: <<http://www.legislation.govt.nz/act/public/2011/0080/latest/DLM2301302.html>>.

³³⁶ Kyle Wadsworth, "Student union calls it quits" (9 June 2012) *Taranaki Daily News* online: Taranaki Daily News <<http://www.stuff.co.nz/taranaki-daily-news/news/7070721/Student-union-calls-it-quits>>.

³³⁷ André Blais and Peter Loewen, "Youth Electoral Engagement in Canada" (2011) *Working Paper Series*, Elections Canada. Online: <www.elections.ca>.

campaigns during political elections.³³⁸ It has not been the practice of central students' unions in Canada to undertake explicitly partisan positions in such campaigns. Providing opportunities for students to work together to understand the functioning of institutional administrations and engage in governmental processes is a crucial function of students' unions on campus and in the community. From time to time, such campaigns may be unrefined, controversial, and even irreverent, but this does not justify immobilizing them. Legislating against activities which encourage and promote democratic participation in civil society – even around topics distasteful to the government of the time – compromises the very purpose of associating.

While *Lavigne* and *Advance Cutting and Coring* make some (divided) provision for accepting a “right not to associate” component to section 2(d), such rights can be justifiably limited when a member of a group would continue to benefit from the work of the association, even if they are not paying dues. This certainly applies to students' unions, which provide broad representation in university governance, advocacy on a range of campus life matters, and services and social programming. Students' associations often provide an avenue for students to participate and engage in democracy – both through participating in the democratic structure of the union, but also through the campaigns and educational activities formed through the students' union. It appears as though attempts to limit student participation in such activities may be driven by disdain or paternalism from decision makers as well as unwillingness to support student democratic engagement.

Canada: Mandatory Student Unions with Provincial Disparity

All students enrolled in post-secondary institutions in Canada are automatically members of and pay dues to their central students' union. The students' unions are

³³⁸ See for example, the Canadian Federation of Students website online: <www.voteeducation.ca>.

usually independent non-profit corporations, subject to non-profit corporate regulations. They are also usually recognized in provincial university acts. By and large, students' unions have arrangements with the respective university to collect and remit dues, provide information about the membership, recognize the representative nature of the union in university structures, and have other arrangements for space provisions for union activities. Some provinces regulate elements of student associations, such as their accreditation and other operational elements, while in other provinces collection and due remittance provisions are developed at the institutional level. This next section compares the landscapes in Ontario, British Columbia, Quebec and Alberta.

Ontario provides minimal regulation for student associations, aside from one minor mention relevant to college students' unions only in the *Ontario Colleges of Applied Arts and Technology Act* which states:

"Student Governing Body"

7. Nothing in this Act restricts a student governing body of a college elected by the students of a college from carrying on its normal activities and no college shall prevent the student governing body from doing so.³³⁹

This clause provides only the most minimal recognition for students' union autonomy and associational freedoms.

In the absence of specific legislation in Ontario, and even though students' unions are generally independently incorporated, university and college administrations exercise broader discretion, entrenched in historical practices, in administering finances and in agreeing to provide access to membership lists. For example, at the University of Toronto, the *Policy for Compulsory Non-Academic Incidental Fees*³⁴⁰ governs the University's remittance of fees to student societies, leaving discretion to withhold fees.

³³⁹ *Ontario Colleges of Applied Arts and Technology Act, 2002* (Schedule F - Bill 109. Summer 2002). Online: Government of Ontario <http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02o08f_e.htm>.

³⁴⁰ Governing Council of the University of Toronto, *Policy for Compulsory Non-Academic Incidental Fees*, Online: <<http://www.governingcouncil.utoronto.ca/policies/compfees.htm>>.

The Policy cites broad-sweeping, and broadly interpreted, provisions for intervening in autonomous students' unions:

Procedures to Address Allegations of Irregularities

3. If the Office of the Vice-President and Provost has reason to believe that a student society is not operating in an open, accessible and democratic fashion and following the terms of its constitution, it shall inform the society of this in writing along with details of whatever inadequacies in the society's conduct of its affairs are alleged to exist. In the case of a divisional student society, the division head should similarly be informed....If the Office of the Vice-President and Provost continues to have reason to believe that significant constitutional or procedural irregularities exist, further instalments of fees may be withheld.³⁴¹

While universities generally respect the autonomy and independence of the central students' unions and their operations, every now and then, elements of an *in loco parentis* approach resurface. Given the discretion available for administrations to withhold students' union fees, there are unfortunately times when students' unions and student societies claim inappropriate intervention by administrators in the operations of students' unions. Referring again to the University of Toronto, the abovementioned policy stipulates that a Memorandum of Agreement be established between the university and central students' unions to determine the protocol for fee collection. It reads:

6. The establishment of compulsory non-academic incidental fees or increases to fees charged for campus services shall be subject to terms and conditions of the Memorandum of Agreement Between The University of Toronto, The Students' Administrative Council, The Graduate Students' Union and The Association of Part-Time Undergraduate Students For a Long-Term Protocol on the Increase or Introduction of Compulsory Non-Tuition Related Fees while it is in effect, and/or other applicable agreements and policies.³⁴²

Unfortunately, since the adoption of the policy in 2003, such an MOA was never finalized because the parties were unable to agree on its terms.

It may not be surprising that the parties at University of Toronto could not finalize such an agreement, when looking historically at disputes between students'

³⁴¹ *Ibid.*

³⁴² *Ibid.*

organizations and the university administration. Only the year prior, controversy ensued when the University of Toronto administration had delayed the collection of a referendum-approved student fee for three student's unions at the University of Toronto³⁴³ voting in favour of membership in the Canadian Federation of Students. Although all three students unions, the University of Toronto Student Administrative Council,³⁴⁴ the Association of Part-Time Undergraduate Students, and the Scarborough Campus Students' Union had approved the fee through their respective internal procedures, the administration executed Article 3 of the *Policy for Compulsory Non-Academic Incidental Fees* (above) to delay the fee collection.³⁴⁵ The Association of Part-time Undergraduate Students initiated legal action against the University of Toronto administration for the decision to delay consideration of the fee. While eventually the fees were approved through the University's governing council and the legal action was dropped,³⁴⁶ the delay in fee collection resulted in several million dollars in uncollected fees to the organizations. Further, the ongoing refusal by the Governing Council to properly adjust the fee, results in continued cumulative losses by the Canadian Federation of Students-Ontario as well as the national branch of the Canadian Federation of Students/(Services).³⁴⁷ Many speculated that the university administration's motivations to intervene to halt the fee collection were suspicious and

³⁴³ "University slams CFS Referendum: Admin Cites Problems in Vote" (27 February 2003) *The Varsity* online: The Varsity <<http://thevarsity.ca/articles/13400>>

³⁴⁴ Currently operating as the "University of Toronto Students' Union"

³⁴⁵ "University slams CFS referendum," *The Varsity*, 27 February 2003. Retrieved from <http://thevarsity.ca/2003/02/27/university-slams-cfs-referendum/>; "Assessment of CFS Referendum by University of Toronto Assistant Director, Student Affairs, Jim Delaney" (25 February 2003). Online: <individual.utoronto.ca/jimdelaney/files/CFSRefDecision.pdf>.

³⁴⁶ The fee collection was approved by the U of T University Affairs Board, June 1, 2004.

³⁴⁷ In 2006, *The Varsity* reported the tally was at \$1.4 million for the University of Toronto Students' Union alone. See "SAC and co. owe CFS \$500k," (6 February 2006) *The Varsity* February 2006. Online: The Varsity <<http://thevarsity.ca/2006/02/06/sac-co-owe-cfs-500k/>>.

indicated a disconcerting effort to override the will of the students at University of Toronto.³⁴⁸

While such disputes are uncommon, another clash recently reached national media attention³⁴⁹ when the students' unions initiated civil proceedings against Carleton University after its governing body threatened to withhold the students' unions fees.³⁵⁰ The students' union fee collection and remittance at Carleton University is stipulated through a Memorandum of Agreement with the students' unions that details the protocol for fee collection. In 2010, the University was in negotiations with the Graduate Students' Association and the Carleton University Students' Association to revise and renew the joint Memorandum of Agreement regarding fee collection when the Board of Governors voted to withhold their fees until an agreement was reached. The students' unions alleged that the vote demonstrated bad faith amidst ongoing negotiations and that what the University was seeking from the students' unions amounted to political interference and an attempt to destabilize students' union autonomy. The parties were able to reach a settlement out of court, after the issue was publicized by the initiation of legal proceedings. When such conflicts arise, it can draw negative attention to the institution and cause undue tensions between the administration and students' union.

In the absence of legislation, another continued difficulty at students' unions lies in their dependence on university administrations to support their associational activities, such as contact with their members to ensure democratic participation. Access to membership lists, while necessary for sharing appropriate information with members of

³⁴⁸ "CFS: it ain't over 'til it's over," (3 March 2003) *The Varsity*, Online: The Varsity <<http://thevarsity.ca/2003/03/03/cfs-it-aint-over-til-its-over/>>.

³⁴⁹ Carleton University Students' Association and the Graduate Students' Association, "Carleton students forced to take university to court over unpaid fees" (11 November 2010) News Release, online: Canada Newswire <<http://www.newswire.ca/en/story/697925/carleton-students-forced-to-take-university-to-court-over-unpaid-fees>>.

³⁵⁰ Court application retrieved online at <http://www.gsacarleton.ca/index.php?section_id=294>.

the corporation for the purpose of participating democratically in the organization's activities, such as annual general meetings and elections, is often prevented when there is no legislation that requires administrations to share them with the association. Many students' unions in Ontario are not able to access membership lists, making it a challenge to inform members of their associational activities or to determine who is a member without relying on the administration's cooperation. While students associations argue that they are entitled to membership information as non-profit corporations, university administrations often point to privacy legislation which prevents them from sharing such personal information with a separate third party.

The Canadian Federation of Students-Ontario argues that students' "right to organize" legislation is necessary for assuring students' unions the ability to appropriately advocate to the university and government the conditions necessary for students on campus – even when they take positions unfavorable to activities or policies of the university administration or other external pressures. The Canadian Federation of Students-Ontario submission to the Government of Ontario on right to organize legislation argues:

While the internal functions, democratic accountability, and fiduciary responsibilities of students' unions and their respective Boards of Directors are already legislated, the capacity of students' unions to fulfill their responsibilities under their own bylaws and the *Corporations Act* lies more or less with the institution's willingness to collect and remit students' union fees. This very fact can have the effect of compromising the ability of students' unions to advocate effectively on behalf of their members, especially if such advocacy runs counter to the opinions and direction of the college or university administration.

In addition, the absence of legislation and a clear dispute resolution mechanism that operates at arms length from the institutional parties involved can produce unnecessary tensions on campus.³⁵¹

The CFS maintains that right to organize legislation to ensure fees security, access to membership lists, and dispute resolution would provide greater assurances for students'

³⁵¹ "Students Right to Organize" (April 2005) Canadian Federation of Students-Ontario Brief, online: Canadian Federation of Students-Ontario <<http://cfsontario.ca/en/section/24>>.

unions to participate in advocacy, political activities – even when those activities opposed or critiqued the respective institutional activities. With the looming threat of fees being withheld, students' unions can be beholden to the benevolence of an administration.

Because of these concerns, students' unions were pleased when legislation was tabled in Ontario to recognize the independence of students' unions from University administrators. In April 2011, Bill 184, the *College and University Student Associations Act*, was introduced to the Ontario legislature:

[T]o recognize the autonomy of student associations at post-secondary educational institutions, to provide for the good governance of student associations, to require accountability of student associations to their members, to promote collaboration and agreement between student associations and post-secondary educational institutions and to ensure the collection and remittance by post-secondary educational institutions of fees levied by student associations.³⁵²

Unfortunately, the Bill died on the order paper when a provincial election was called. It is likely that students in Ontario will continue to seek support in the implementation of right to organize legislation. In the absence of such legislation, students' unions are still able to assert a relatively large degree of autonomy as independently incorporated bodies and to politically assert their independence from administrative interests.

If it seems somewhat preposterous that university administrations or decision makers would concern themselves with the operations and activities of students' unions, the following example of political interference in students' union elections may be surprising. The right of a group to elect their own leaders and designate their own representatives is a crucial component of an association's autonomy and democratic practices. Many issues come up during students' union elections, but perhaps none with more unveiled indications of political and administrative interest than as at York

³⁵² Bill 184, *College and University Student Associations Act*, Government of Ontario. (2011) Online: Ontario Legislative Assembly
<http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet&BillID=2488>.

University. In 2009, the York Federation of Students (YFS) filed a request under the Ontario *Freedom of Information and Protection of Privacy Act* to investigate university correspondence regarding their Spring 2009 general elections. York University, an institution reputed for its highly politicized and racially diverse campus, is often at the cutting edge of progressive academic activities and social activism. The YFS learned that members of the university administration had been in regular correspondence with Conservative staff and Conservative Members of Provincial Parliament about the students' unions elections results. Included in this correspondence were e-mail exchanges strategizing on how to possibly achieve a different outcome or annul the election results when a politically progressive team was elected.³⁵³ The external and internal interest in attempting to undermine democratically elected student representatives indicates a significant necessity to reinforce the independent and autonomous relationship between students' unions and administrators. However, in spite of the importance of reinforcing legislation, it is still likely that students' unions need to maintain vigilance to protect their autonomy and independence.

Legislation in British Columbia and Quebec

Students' unions across Canada have looked to BC and Quebec as leading examples of protection for union security. In 1998, the BC Legislative Assembly amended its *College and Institute Act*³⁵⁴ and *University Act*³⁵⁵ to include provisions for student societies' dues security, accountability and association provisions. The amended

³⁵³ York Federation of Students. "Conservative Politicians and York University Administrators Revealed Interfering in York Student Elections" News Release (6 July 2009) online: Canada Newswire <<http://www.newswire.ca/en/story/399063/conservative-politicians-and-york-university-administrators-revealed-interfering-in-york-student-elections>>.

³⁵⁴ *College and Institute Act*. [RSBC 1996] CHAPTER 52.

³⁵⁵ *University Act*. [RSBC 1996] CHAPTER 468.

Act added, "student society of student organization" to its definition of "representative group", which also includes in this category "bargaining agent" as defined in the *Labour Relations Code*.³⁵⁶ The legislation outlines the provision for the corresponding university, in its role as a trustee, to collect and remit student society fees. It further recognizes the students' collective right to select student association external affiliation at a provincial or national level and stipulates that universities shall collect and remit fees for this purpose. Further, BC student associations are entitled to access membership lists through the university registrar, which are clearly necessary for the students' union to engage its members in associational activities.³⁵⁷ The *Acts* outline the two provisions where the university can cease collection or remittance of student society fees: if the student union fails to make available to and inform its members of audited financial statements and reports; or if the organization is no longer registered with the *Society Act*, thus is no longer incorporated.³⁵⁸ These provisions shield student associations from undue interference from an unfriendly administration or government.

Similarly, Quebec formally recognizes students' unions in provincial legislation. Established in 1983, Quebec's legislation, *An Act respecting the accreditation and financing of students' associations*,³⁵⁹ outlines provisions for local and external student association affiliation, including: education institutional duties to provide free office space and bulletin boards, access to membership lists, student representation on institutional governing bodies, and a process for dispute resolution.

³⁵⁶ *Labour Relations Code*, RSBC 1996, c 244.

³⁵⁷ *University Act*. [RSBC 1996] CHAPTER 468 at section 45.

³⁵⁸ *College and Institute Act*. [RSBC 1996] CHAPTER 52 at section 13.1; *University Act*. [RSBC 1996] CHAPTER 468 at section 27.1.

³⁵⁹ *An Act respecting the accreditation and financing of students' associations*. R.S.Q., chapter A-3.01.

But while legislation can bolster student associational freedoms such as in BC and Quebec, it can also be drafted to restrict, instead of protect, associational freedoms. In a much less optimal model, Alberta's *Post-Secondary Learning Act*³⁶⁰ also outlines provisions for the management of student associations, but it is crafted in a much more paternalistic fashion requiring the students' association to create bylaws, collect membership dues, and to communicate to the university and the board on behalf of its membership. The province further legislated against certified labour unionizing amongst academic workers. The graduate students' association became the official bargaining agent of graduate student employees, thereby precluding graduate student employees from unionizing in a certified labour union. Similarly, the legislation further restricted faculty associations from unionizing and exercising their right to strike. Thus, while the contemporary jurisprudence on *Pridgen*³⁶¹ opens up questions of *Charter* application to elements of student discipline regulated in the *Post-Secondary Learning Act*, other aspects of the legislation also raise red flags on the whether the law upholds associational freedoms. The legislation in Alberta is problematic; thus if other provinces do introduce student association legislation, students' unions will need to work closely with government officials to ensure that legislation is drafted with the protection of associational freedoms and student interests at the forefront.

Threats to Associational Activities in BC and Quebec

Despite model statutory protections for student associations, both the governments of BC and Quebec have implemented statutes that undermine student associational rights in the face of increasingly discontent and dissenting student voices, and narrow spaces for direct democracy in both university governance and in the

³⁶⁰ *Post-secondary Learning Act*, SA 2003, c P-19.5. Government of Alberta.

³⁶¹ *Pridgen v. University of Calgary*, 2012 ABCA 139.

broader political sphere.

In November 2011, British Columbia's liberal government adopted amendments to its advanced education legislation (Bill 18)³⁶² that prohibits the elected representatives of student, faculty, and staff associations from participating in the highest decision-making bodies of BC's universities and colleges. The rationale put forth by the government was that such elected representatives are *de facto* in a conflict of interest with the goals of a post-secondary institution's governing body, unable to appropriately represent their constituency while fulfilling their director duties on the board of governors.³⁶³ The bill further provides that any student or labour board of governor representative may be removed from the board with a two-thirds majority vote. They are also prohibited from acting as chair of the board. Two unions representing post-secondary employees have launched a constitutional challenge against Bill 18, alleging that forcing union members to remove themselves from boards of governors is an affront to democracy and violates *Charter* rights.³⁶⁴ A similar move was attempted in April 2012 by Lakehead University when the administration introduced a policy that would prohibit student board of governor representatives from voting on tuition fees, claiming a conflict of interest. However, the proposal quickly stirred enough upset to compel the university to reverse its decision.³⁶⁵

³⁶² *Advanced Education Statutes Amendment Act*, (RSBC 2011 Chapter 7).

³⁶³ Arshy Mann "Board members could be ousted at B.C. universities as Bill 18 signed into law" (20 April 2012) *Canadian University Press*, online: Canadian University Press <<http://cupwire.ca/articles/52636>>

³⁶⁴ Federation of Post-Secondary Educators, "Unions File Court Challenge of BC Liberals' Advanced Education Amendments" (11 June 2012) News Release, online: Federation of Post-Secondary Educators <www.fpse.ca/news/fpse-news/unions-file-court-challenge-bc-liberals%E2%80%99-advanced-education-amendments>.

³⁶⁵ "Student union and Lakehead U. board at odds," (26 April 2012) *CBC News*, online: CBC News <<http://www.cbc.ca/news/canada/thunder-bay/story/2012/04/26/tby-lusu-challenge.html>>.

During the 2012 student strike in Quebec, *Bill 78 – An act to enable students to receive instruction from the post-secondary institutions they attend*,³⁶⁶ was perhaps the most direct affront to student associational freedoms in Canadian history. Dubbed as “draconian” or the “truncheon law” in the media, the legislation attempted to outlaw the general strike which started in February 2012 to protest the lifting of an almost 22 year tuition fee freeze in the province. The media focused particularly on the restrictions on peaceful assembly in the law that prohibited assemblies of 50 people or more without an advance permit. However, the elements of the legislation affecting student associational freedoms could be considered even more perilous.

Section 25 of the special law imposes fines on individuals ranging between \$1,000 and \$5,000 for violating the law. But if an individual is an elected leader of a student association, a trade union, or someone deemed to be the organizer of a demonstration, the retaliation is even more severe, with financial penalties ranging from \$7,000 to \$35,000. Student associations, trade unions, or other groups found to commit a violation of the law would face fines between \$25,000 and \$125,000. However sections 18-21 of the law impose even more detrimental long-term consequences for the viability of student associations who continue to support the student strike. The law empowers the Minister of Education to order the temporary or permanent cessation of students’ union fee collection and the provision of space, furniture and display boards to a student association violating the law. Article 18 reads:

If the Minister notes that the institution is unable to deliver instructional services as a result of a failure by a student association to comply with an obligation imposed by this Act, the Minister may, despite any provision to the contrary, order the institution to cease collecting the assessment established by the student association or any successor student association and to cease providing premises, furniture, notice boards, and display stands to the student association free of charge.³⁶⁷

³⁶⁶ *An Act to enable students to receive instruction from the postsecondary institutions they attend* (L.Q., 2012, c. 12 / Laws of Quebec, 2012, chapter 12). *The law expires July 1, 2013.*

³⁶⁷ *An Act to enable students to receive instruction from the postsecondary institutions they attend* (L.Q., 2012, c. 12 / Laws of Quebec, 2012, chapter 12) at art. 18.

Quebec has a long history of student strikes. Quebec students have taken strike votes and gone out on general strike numerous times since 1968. Laval University professor Louis-Philippe Lampron told CBC that, in outlawing this historically-accepted tactic in student negotiations with the government, Bill 78 was “enforcing a governmental position that is going against the social consensus of 50 years about the right of student associations’ to strike.”³⁶⁸ The Quebec Bar Association argued that the law posed unjustifiable limits to fundamental freedoms.

Le Barreau est d’avis que les sanctions financières sévères imposées aux associations dans le cas où il serait impossible pour les établissements d’enseignement de dispenser des services en raison d’actes attribuables à des associations étudiantes limiteront également la liberté d’association et pourraient porter atteinte à la survie de ces associations étudiantes.³⁶⁹

The national student associations in Quebec filed a constitutional challenge in response to the adoption of Law 12, making many of the abovementioned arguments in their court filing. They further explained that, given that the student accreditation legislation does not outline negotiation or mediation processes for negotiating with student associations on issues of student interest, the only real method they have to communicate their opposition and garner support is through striking. The student strike should be considered similar to an information picket – an expressive activity utilized to express student opposition to the tuition fee hikes. The complainants further contend that the special law, especially through articles 16 and 17, which prevent assemblies of 50 or more individuals, intended to dissuade student protests and reinstitute business as

³⁶⁸ Mark Quinlan “Quebec’s new anti-demo law raising rights concerns” (25 May 2012) CBC News online: CBC News <<http://www.cbc.ca/news/canada/story/2012/05/25/f-quebec-emergency-law-explainer.html>>

³⁶⁹ Barreau du Québec, “Le Barreau du Québec formule de sérieuses inquiétudes” (May 2012) News Release, online: Barreau du Québec <www.barreau.qc.ca>
To paraphrase in English: *The Quebec Bar Association believes that the severe financial penalties imposed on student associations in cases where post-secondary institutions are unable to deliver services would limit their freedom of association and could ultimately threaten the survival of those student associations.*

usual. They further challenge the overriding provisions empowering the Minister of Education, Sports, and recreation to undo students' associations through the confiscation of their resources. Threatening the fee collection and access to the space and furnishings of a students' union threatens the survival of student associations. Finally, the plaintiffs argue that the legislation seriously threatens the survival of Quebec's student associations:

Ce que le législateur croyait être essentiel pour la formation et la survie des associations d'étudiants, c'est-à-dire la perception. La remise de la cotisation, la fourniture d'un local et du mobilier, pouvant maintenant faire défaut, les associations étudiantes peuvent mourir.³⁷⁰

Quebec's student movement is historically unique in Canada, having been built from a stronger history of student mobilization and direct engagement with governmental politics – especially around tuition fees. In fact, more so than other Canadian provinces, the Quebec student groups have sustained a model of negotiating with the provincial government around student issues. When such negotiations have not sustained acceptable results, Quebec students have employed general strikes, analogous to the practice of labour unions. Between 1968 and 2012, eight of the nine general student strikes garnered positive results for students.

Students and the “Right to Strike”

Some student leaders in Quebec suggested that student association accreditation legislation ought to include “right to strike” protection in order to deter the adoption of such legislation.³⁷¹ However, this proposal to write in “right to strike”

³⁷⁰ Fédération étudiante collégiale du Québec (FECQ) c. Québec (Gouvernement du) 2012 QCCS 2860. Arguments of the complainants:

To paraphrase in English: “*What the legislator (in including fees security provisions in the student association accreditation law) believed to be essential – the remittance of dues, and the furnishings of a local, could now be eliminated, and student associations could die.*”

³⁷¹ Former leader of the Fédération étudiante collégiale du Québec, M. Leo Bureau-Blouin who was elected as a member of the National Assembly of Quebec, proposed that “right to strike”

language into legislation is problematic for a few reasons. First, as already discussed, Canadian jurisprudence does not provide any decisive protections for the “right to strike” for trade unions, so it is highly unlikely that governments would be inclined to make broad provisions for student strikes to occur as they did in Quebec in 2012.

The Coalition Large pour une Solidarité Syndicale Étudiante (CLASSE), the key organizing coalition of the student strikes, articulated its approach to striking in its manifesto:

In choosing to strike...we have chosen to create a power relationship, the only mechanism that will allow us to tip the scales. History has shown us eloquently that if we do choose hope, solidarity and equality, we must not beg for them: we must take them.³⁷²

Attempting to legislate the parameters of a social movement is problematic and unlikely to garner the desired protections. “Right to strike” legislation would, without a doubt, not have made the mobilizations in Quebec any more legitimate before the law. In fact, such legislation would likely only have served to narrow the parameters of how students and their associations can strike, relying on the government to impose limits on their internal democratic decisions.

Conclusion

Students have organized on various interests to bring cultural, political, social and academic vitality to campuses. Organizing towards autonomous, self-organized student associations was a crucial departure from an *in loco parentis* framework for student-institutional relations. But across the country, students’ associations operate with varying degrees of independence. Legislation ensuring dues security, access to membership lists, and other provisions for student associations can assist in bolstering

provisions for student associations would solve the problem of injunctions and Bill 78. See Graeme Hamilton “PQ goes all-in on student movement” (25 July 2012) *National Post*, online: National Post <<http://www.nationalpost.com/related/topics/goes+student+movement/6984862/story.html>>.

³⁷² “Share our Future: The CLASSE manifesto” Online: <www.stopthehike.ca>.

students' union autonomy, thereby shedding many elements of paternalism that can otherwise creep in from administrations may attempt to intervene in the operations of a student association.

The jurisprudence on freedom of association has left much to be desired in terms of encouraging positive obligations for governments to ensure that associational activities are protected. Despite the weak jurisprudence, there is still much that can be accomplished through the implementation of legislation. We can look to Quebec and British Columbia where model legislation establishes basic provisions for ensuring students' union autonomy. In spite of these provisions, students need to continue to be vigilant to challenge students' union activities that are connected to broader social and political matters in the face of efforts to stifle student dissent. Quebec's special law, proposals for students' union voluntarism, and bans on student representatives on university governance are all indicative of a backlash against student public participation that could have detrimental consequences for democratic engagement – both on campus and in civil society more broadly. As we will continue to discuss in the subsequent chapter, political engagement on campus should not be discouraged. And the collective resources pooled for students should not be undermined. In the face of rising tuition fees, higher student debt, and socio-economic insecurity in higher education, students' associations may need to play an even larger role in the discourse on the future of post-secondary education. Their collective voice will continue to be crucial in the face of dramatic political, economic, and educational transformation.

As such, students need to be diligent in asserting their associational rights and challenging rhetoric that attempts to demonize their activities. Faculty unions and other campus trade unions also need to reinforce a return to collegiality in our post-secondary institutions, including significant resistance against increasing corporate pressure to turn over decision-making to wealthy donors instead of the academic community. The

strength in numbers students realize from associating contributes to providing the democratic spaces to realize their expressive and intellectual activities on campus.

Chapter 5: Expressive Activities on Campus: Student Non-Academic Discipline and Dissent

Supreme Court of Canada Justice Cory wrote that it is “difficult to imagine a guaranteed right more important to a democratic society than freedom of expression.”³⁷³ It is just as difficult to imagine a guaranteed right more important to higher education than freedom of expression. Intellectual freedom, at the heart of the fundamental freedom of expression, is clearly relational to intramural and extramural expression of both instructors and students. While academic freedom may be a specialized right, freedom of expression is a core protected right for all in Canada under section 2(b). Green distinguishes the narrow right of academic freedom from broad civil liberties of expressive freedoms.

[A]lthough supported by general moral and political rights (including freedom of expression and opinion), academic freedom reaches further and only applies to certain people and certain contexts, particularly in schools and universities. Everyone is entitled to freedom of speech; teachers and students, especially in the classroom, are also entitled to further protections associated with their roles.³⁷⁴

But speech, while seemingly an obvious necessity for higher education, may not be as secure as we might expect in Canada’s post-secondary institutions. Chapter 2 already explored the limitations of carving out a special right of academic freedom under the umbrella of freedom of expression constitutional jurisprudence. Chapter 3 revealed the inconclusive jurisprudence on *Charter* protection freedoms in campuses across Canada. In the context of the analysis leading up to this chapter, I will explore how expressive activities, particularly critique and dissent, are necessary in the academy – regardless of how the courts may understand their relationship to the law.

³⁷³ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at p. 1336.

³⁷⁴ Green, 2003, 384-385.

Many factors affect expressive activities on campus. The right to engage in unfettered debate and dissent on campus, particularly on political matters, has come under scrutiny from internal and external pressures in Canada's post-secondary institutions. And, in the courts, universities have attempted to guard themselves from scrutiny of their commitment to expression. Student codes of conduct, special laws restricting protests, space booking policies, and various other regulations and processes seem to be adopted and adapted at an accelerated pace indicating a return to an *in loco parentis*³⁷⁵ model of student discipline and regulation. Added to this is a growing concern about police and security presence on campus and proliferation of the use of police force against student protesters.

Debates about the parameters of expressive freedoms on Canadian campuses are common these days – some of them have seen the courtrooms and many others issues have been in the media. Sometimes the conflicts arise from controversy and uncomfortable debate on campuses. From overt censorship of Israeli Apartheid Week materials, to arrests of student activists, efforts to limit student participation in governance, and a perceived increase in sanctions against students, to what extent expressive activities are protected for students on Canadian campuses requires consideration. Some of the conflicts arise from debates between free speech and combating discrimination and harassment on campus. Another problematic in protecting expressive activities are the challenges within university communities to both fully commit to free and unfettered inquiry while maintaining genuine and substantive

³⁷⁵ As described in Chapter 2, Horn (1998) explains that early Canadian post-secondary institutions adopted an *in loco parentis* model with students, assuming a certain degree of legal responsibility for students. While there is less prevalence of such a notion – having been largely rejected in the 1960s in the U.S. and Canada, the persistence of codes of conduct and policies and regulations in student residences indicate that the tradition continues to resonate on Canadian campuses. Little has been written about this model's influence in Canadian post-secondary institutional student affairs. However, for more information on the American historical context, see Nick Sweeton and Jeremy Davis, "The Evolution of *In loco parentis*" (2004) XIII *Journal of Student Affairs* 67-72.

commitments to combating discrimination and harassment on campus. However, some scholars and free speech activists critique that language of “civility”, “equality”, “diversity”, “harassment” and “academic freedom” are being appropriated or misused.³⁷⁶ Thus, the reconciliation of and intersection between freedom and equality of expression continue to be major challenges.

As previously mentioned, the increasingly commercialized educational environment reprioritizes some administrative activities where universities play a greater role administering student judicial affairs and focusing their operations on models of risk management. As a result, the decision-making at university boards may be increasingly influenced by consideration of liabilities and indemnities rather than in consideration of pedagogical growth.³⁷⁷ University administrative decisions are further influenced by greater reliance on philanthropy for funding, thereby compelling university administrators to prioritize the university’s reputation and donor interests, possibly at the expense of promoting a healthy and vibrant learning environment that supports dissenting, even controversial, views.³⁷⁸ Thus, it is often those members of the academic community who engage in extramural expression against whom the university is compelled to retaliate or suppress to protect the institution’s reputation.³⁷⁹

Adding further strain to the vitality of expressive activities on Canadian campuses is the publicized omission of recognizing extramural expression in AUCC’s new statement on academic freedom. Similarly, the actions of universities before the courts,

³⁷⁶ Kevin Mattson, “The Right’s War on Academe and the Politics of Truth,” *Universities at Risk: How Politics, Special Interests, and Corporatization Threaten Academic Integrity*. James L. Turk, ed. (Toronto: Lorimer, 2008) 225-236.

³⁷⁷ Gadja, 2009.

³⁷⁸ See Schrecker, 2010; Linda McQuaig and Neil Brooks, *The Trouble with Billionaires*. (Toronto: Penguin Books, 2010).

³⁷⁹ Scott, 2009.

aggressively attempting to dodge *Charter* scrutiny, further indicates aversion to proactively embracing meaningful commitment to vibrant and critical intellectual activities on campus.

This chapter explores the extent to which dissent and debate is tolerated, even welcomed, on Canadian campuses in the context of disparate constitutional protections and expanding administrative efforts to discipline and regulate student activities. This proceeds through a critical analysis of contemporary efforts to regulate student conduct and its implications for expression, intellectual thought, and student critical thinking in light of contemporary Canadian jurisprudence. Finally, this chapter considers what legal and legislative options are available to maintain high standards of expressive freedoms and foster debate and dissent, while avoiding an increasingly litigious landscape that would likely hinder, rather than encourage, pedagogical efforts to support student freedom to learn.

The Context of Political Dissent on Canadian Campuses

Student activism for intellectual and expressive freedoms chronicles back to the 19th century in Canada. As early as 1883, the *Varsity*, student newspaper at University of Toronto, called for intellectual and social freedom for students.³⁸⁰ Horn has further described how McGill University professor Stephen Leacock denounced the University's efforts to regulate student speech and behaviour as early as 1936. Various mobilizations in post-secondary institutions across North America would continue throughout the century. Students have applied their curricular experiences to their extracurricular practices negotiating rights and freedoms on campus leading to exercises of political, social and civic engagement. Through such activities, students were successful in securing representation in university governance, transforming curriculum,

³⁸⁰ Horn, 1999.

engaging in meaningful critique of institutional policies and academic programming, and organizing political, social, religious and cultural activities.³⁸¹ 1968 is sometimes referred to as “the year of the student” for the insurgence of “New Left” politics and the uprising of students against various political issues, most notably condemning the Vietnam War and supporting the civil rights movement. The sixties and seventies generated prolific and unquestionable social change, particularly in the U.S, but in Canada as well. Throughout the 1980s and 1990s student activism against South African apartheid resulted in divestment activities on numerous campuses³⁸² and, later, anti-globalization activism and education rights became a focal point of organizing. In the face of post-9/11 global politics on international affairs and the 21st century’s global economic crisis, mobilizations have erupted on various political issues, such as resistance to the G20, anti-war initiatives, and anti-austerity/privatization initiatives. In fact, significant social change can, in part, be attributed to the mobilization, solidarity, and collaboration of students on a wide range of social issues.

In recent years, student unrest has resurged around the globe – major student mobilizations against tuition fee hikes from Quebec’s “Maple Spring,”³⁸³ to Chile,³⁸⁴ to

³⁸¹ Downs and Manion, 2004.

³⁸² see - Alroy Fonseca, “Looking back at Carleton’s divestment from South Africa”, (22 January 2010) *Rabble.ca* Online: rabble.ca <<http://rabble.ca/news/2010/01/looking-back-carletons-divestment-south-africa>> - for an historical account of the student-led South African divestment activities at Carleton University.

³⁸³ See for example - Jesse Rosenfeld, “The Maple Spring,” (Fall 2012) 44 *Maisonneuve* -for an account of the 2012 student protests against tuition fee hikes in Quebec.

³⁸⁴ See - Daniel Salinas and Pablo Fraser, “Educational Opportunity and Contentious Politics: The 2011 Chilean Student Movement.” (2012) 3:1 *Berkeley Review of Education* - for an overview of the student protests in Chile demanding free education and against private-for-profit educational institutions beginning in May 2011.

California³⁸⁵ – mainly as a response to global austerity measures and privatization. In the face of such political mobilizations, the relationship between student liberties and student discipline is only becoming more contentious. For example, demonstrators at University of California may face jail time for participating in occupations,³⁸⁶ and, in an effort to halt the strikes in Quebec, Bill 78³⁸⁷ which imposed large penalties on students and student associations involved in the 2012 Quebec student strike. Penalties are also imposed at the institutional level through codes of conduct, trespass laws, and policies on disruption. As student unrest appears to be trending, and as authorities attempt to place greater restrictions on activities of dissent, it is yet to be seen whether resistance and direct dissent may simply become the new trend. If this is indeed the trend, it will be crucial to monitor the discourse around civil liberties and student rights if unrest on campuses continues to escalate.

In Canada, criticisms of heightened police presence during student demonstrations and the penalization of student dissent have appeared in the media and in the courts. At the University of Toronto in 2008, students and student representatives, who came to be known as the “Fight Fees 14”³⁸⁸ were criminally charged by Toronto Police and also charged with under the University’s *Code of Student Conduct* after occupying Simcoe Hall, the administrative building, in opposition to 40% residence fee hikes implemented by the university. All charges (both criminal and code of conduct)

³⁸⁵ See - Michael Farrell, “Fee hikes bring student protests back to California universities,” (2009) *The Christian Science Monitor*. December 10 - for an overview of the 2009 protests at University of California opposing tuition fee hikes and public funding cuts.

³⁸⁶ Support the Davis Dozen, “11 UC Davis Students, Professor, Charged For U.S. Bank Blockade: Accused May Face up to Eleven Years in Prison” (2012) News release Online: Support the Davis Dozen <http://davisdozen.org/?page_id=18>.

³⁸⁷ *An Act to enable students to receive instruction from the postsecondary institutions they attend* (L.Q., 2012, c. 12 / Laws of Quebec, 2012, chapter 12).

³⁸⁸ For more information, visit <http://fightfeescoalition.blogspot.ca/>.

were eventually dropped. Two of the accused filed legal action against the University and Toronto police claiming violation of their *Charter* rights.³⁸⁹ In fact, two former University of Toronto students who were also employees of a students' union have alleged that they were criminally targeted because of their leadership positions on campus, for allegedly participating in the sit-in.³⁹⁰

During the G20 demonstrations in Toronto of June 2010, concerns were raised when University of Toronto decided to close its downtown campus, leaving only the Munk School of Global Affairs open. Not only was it a concern that classes would not take place during a time of global political importance, and students would be kicked out of their residences to house out-of-town security, but the perceived cooperation of the University administration in stifling political activism of students and students' associations was disconcerting.³⁹¹ In some ways, it was even more disconcerting when those suspicions were confirmed when the Office of the Independent Police Review Department revealed that the University of Toronto had hired a private investigator to monitor the activities of the campus students' unions. Approximately 80 unlawful arrests and detentions had occurred at the Graduate Students' Union the weekend of the G20

³⁸⁹ Martin Waldman, "Fight Fees 14 Fight Back: The Fight Fees 14 sue U of T and Toronto Police over charter rights violations" (11 November 2010) *The Newspaper*. Online: The Newspaper <<http://www.thenewspaper.ca/the-news/item/347-fight-fees-14-fight-back>>.

³⁹⁰ In *R v Ramsaroop*, 2009 ONCJ 406, the Court determined that the charges, bail conditions, and delay of trial led to undue hardships, including infringement to their study and work. Varga and Ramsaroop subsequently launched proceedings against the University of Toronto and Toronto Police Services for being targeted for their roles in the students' union and being involved in the sit-in; "'Fight Fees 14' under unusual double investigation: With trial pending, U of T launches student code investigations of Simcoe Hall sit-in" (16 June 2008) *The Varsity* Online: The Varsity <<http://thevarsity.ca/articles/3679>>.

³⁹¹ Angela Regnier, "G20 aims to shut down UofT and academic integrity" (23 June 2010) *rabble.ca* online: <www.rabble.ca>.

demonstrations in Toronto.³⁹²

McGill University was also recently criticized for a series of interactions between private security agents and students and non-academic staff stemming from a series of demonstrations, picketing, and an office occupation.³⁹³ Concerns of escalating exertion of police force against peaceful protestors have prompted various reactions from students and the public. In November 2011, when McGill students occupied an administration building, riot police used clubs and pepper spray against demonstrators. The police actions were significant enough to raise concern by the Canadian Civil Liberties Association, who wrote to the University principal supporting the importance of student protest in broader social movements:

The events of November 10 are troubling particularly in the context of peaceful student protests which are protected by the *Canadian Charter of Rights and Freedoms*. Universities have always been sites of participation and lively debate and many important protest movements have their roots in student protests. Within this context, university staff, including security personnel should be trained to deal with non-violent protest tactics such as occupation in a respectful and collaborative manner.³⁹⁴

Subsequently, McGill University banned four students from campus, under the *Student Code of Conduct and Disciplinary Procedure*,³⁹⁵ as a result of their actions during the McGill support staff union's strike.³⁹⁶ The series of incidents culminated in two inquiry

³⁹² Gerry McNeilly, "Policing the Right to Protest: G20 Systemic Review Report." (16 May 2012) Toronto: Office of the Independent Police Review Director, Online: Office of the Independent Police Review Director <www.oiprd.on.ca>.

³⁹³ Erin Hudson, "Private security in a public university" (4 Feb 2012) *McGill Daily*. Online: McGill Daily <<http://www.mcgilldaily.com/2012/02/private-security-in-a-public-university/>>.

³⁹⁴ Letter from Abby Dushman and Cara Faith Zwibel, Canadian Civil Liberties Association to Principal Heather Munroe-Blum, McGill University (12 December 2011) online: Canadian Civil Liberties Association <<http://ccla.org/2011/12/16/ccla-concerned-about-police-presence-during-campus-protest/>>

³⁹⁵ McGill University, *Code of Student Conduct and Disciplinary Procedures*. Online: McGill University <www.mcgill.ca/files/student.../Code_of_Student_Conduct.pdf>.

³⁹⁶ Queen Arsem-O'Malley, "Four students banned from campus: Article 21(a) invoked for strike-related actions" (30 March 30 2012) *McGill Daily* online: McGill Daily <<http://www.mcgilldaily.com/2012/03/four-students-banned-from-campus/>>

reports which included recommendations about security presence and violence, freedom of speech, expression and assembly, and other matters related to protest and dissent on the campus.³⁹⁷ The later introduction of a “provisional protocol” for demonstrations, protests, and occupations again raised concern about the University’s commitment to expressive freedoms, along with freedom of peaceful assembly.³⁹⁸ One McGill student filed a complaint against the protocol, observing that the university administration has become less lenient about student protest since he had been the student union president in the 1960s. He further reported to the *Montreal Gazette* that he sees a new attitude that is “part of the new corporate university” and that such restriction on protest “has a very chilling effect.”³⁹⁹ Because of public pressure, particularly from the Canadian Civil Liberties Association,⁴⁰⁰ the protocol was ultimately withdrawn.

And finally, to only briefly revisit the student strike in Quebec, the government attempted to end dissent to its plans to lift the 22-year tuition fee freeze by adopting the special law.⁴⁰¹ In addition to the government actions, regulatory activities were

³⁹⁷ See “Final Report on the events of November 10, 2011” (1 March 2012) The Independent Student Inquiry, online: <<http://independentstudentinquiry.blogspot.ca/>>; and Professor Daniel Jutras, Dean of Law, McGill University, “Report of the Internal Investigation into the Events of November 10, 2011” (11 December 2011) online: McGill University <<http://www.mcgill.ca/dean-jutras-report/report>>.

³⁹⁸ “Provisional Protocol Regarding Demonstrations, Protests, and Occupations on McGill University Campuses,” adopted by the McGill University administration on February 12, 2012. McGill University online: McGill University <http://www.mcgill.ca/files/_nea/214062_ProvisionalProtocolEnglish.pdf>.

³⁹⁹ Karen Seidman, “McGill student files grievance against code of conduct,” (10 January 2012) online: *Montreal Gazette* <<http://www.montrealgazette.com/news/McGill+student+files+grievance+against+university+provisional+protocol+demonstrations+protests/7797841/story.html>>.

⁴⁰⁰ Letter from Cara Faith Zweibel, Canadian Civil Liberties Association, to Michael Di Grappa, Vice-Principal, and Anthony C. Masi, Provost, McGill University (8 January 2012) online: Canadian Civil Liberties Association <<http://ccla.org/wordpress/wp-content/uploads/2013/01/2013-01-08-PDF-Letter-to-McGill-re-draft-protocol.pdf>>.

⁴⁰¹ *An Act to enable students to receive instruction from the postsecondary institutions they attend* (L.Q., 2012, c. 12 / *Laws of Quebec*, 2012, chapter 12); *Advanced Education Statutes Amendment Act*, (RSBC 2011 Chapter 7).

undertaken at the institutional level, such as refusing space bookings. For example, administrators at l'Université du Québec en Outaouais attempted to block a space booking when the students' association invited Gabriel Nadeau-Dubois, the spokesperson for CLASSE, to speak on the campus. The administration cited concerns around security as the reason for denying the space booking. However, the faculty association stepped in to book space for the event on behalf of the students.⁴⁰² Concordia University additionally sent letters of sanctions to students who participated in the disruption of classes.⁴⁰³ In September 2012, Quebec professors released a declaration calling for a public inquiry into the police repression that occurred earlier that year during the student mobilizations. They declared that "Nous avons donc été témoins de la plus grande vague de répression policière de l'histoire du Québec contemporain, marquée par 3387 arrestations du 16 février au 3 septembre 2012."⁴⁰⁴ In November 2012, a Quebec judge subsequently found Nadeau Dubois guilty of contempt of court for publicly expressing support for the legitimacy of continuing to strike the face of legal injunctions that were filed.⁴⁰⁵ The judgment of guilt sends a chilling message to students'

⁴⁰² Catherine Lamontagne, "La CLASSE s'arrêtera à l'UQO" *Le Droit*. (27 juillet 2012) online: *Le Droit* <<http://www.lapresse.ca/le-droit/actualites/education/201207/26/01-4559861-la-classe-sarretera-a-luqo.php>>.

⁴⁰³ Karen Seidman. "Concordia University sends sanction letters to students" (5 June 2012) *Montreal Gazette* online: *Montreal Gazette* <<http://www.montrealgazette.com/life/Concordia+sends+sanction+letters/6726704/story.html>>.

⁴⁰⁴ Excerpt from Francis Dupuis-Déri, "Mouvement étudiant et répression policière - Pour une commission d'enquête publique" (Declaration for a public inquiry into police repression against the student movement) (19 September 2012) *Le Devoir* online: *Le Devoir* <<http://www.ledevoir.com/societe/justice/359443/pour-une-commission-d-enquete-publique>> [Paraphrased as "We have witnessed the largest incidence of general police repression in Quebec's recent history – with 3387 arrests occurring between February 16 and September 3, 2012."]

⁴⁰⁵ *Morasse c. Nadeau-Dubois* 2012 QCCS 5438.

union spokespersons and other union leaders for their ability to be silenced for speaking out against unjust laws in public.

While student participation in occupations, or demonstrations, or solidarity picketing in labour disputes are by no means new to Canadian campuses, these examples illustrate that the incidences of university regulatory sanctions and police involvement in these events are on the increase. Commitments to freedom of assembly and expression ought to be maintained, even in political activities on campus. Otherwise, heavy-handed activities either preemptively or with the use of excessive police force are little better than the explicit banning of campus political activities seen in other nations, such as Singapore.⁴⁰⁶ This next section explores the freedom of expression jurisprudence in Canada and its commitment to supporting dissent and critical debate.

Freedom of Expression in Canada and Dissent

At the core of freedom of expression in Canada is the assumption that the ability to freely express and debate is essential in a democracy. The Supreme Court of Canada recognizes that the fundamental purpose of protecting expression is to protect minority or dissenting views:

Freedom of expression was entrenched...so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.⁴⁰⁷

The Supreme Court has noted that freedom of expression "is one of the fundamental concepts that has formed the basis for the historical development of the political, social,

⁴⁰⁶ Singapore's *Public Order Act* (Chapter 257A), for example, prohibits political activity on campus, which has been criticized by NGO, Human Rights Watch. American Ivy League School Yale University has recently been publicly criticized for opening a campus in Singapore that would be required to abide by similar restrictions on student political activity. See, for example, Jill Langois "Yale defends restrictions on protests at Singapore campus" (20 July 2012) *Global Post* online: Global Post <www.globalpost.com>

⁴⁰⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 968.

and educational institutions of western society.”⁴⁰⁸ Further, freedom of expression is necessary for fostering social change:

The core values which free expression promotes include self-fulfillment, participation in social and political decision-making, and the communal exchange of ideas...It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's like and perhaps the wider social, political, and economic environment.⁴⁰⁹

The human right to critique and dissent extends beyond mere political expression, and relates to a broad set of expressive activities, including the right to critique non-governmental activities.⁴¹⁰ The Supreme Court of Canada recognizes that some forms of public protest or direct action, such as public demonstrations and information leafleting, are sometimes the most available method for groups with less economic or political power to critique more powerful individuals, institutions, and corporations.⁴¹¹ Because of these power imbalances that can skew access to public expression, the Supreme Court has found that such activities are protected in order to equalize opportunities to express.⁴¹² The right to critique non-governmental bodies has been upheld in the context of “counter-advertising.”⁴¹³ Thus, as a consumer, one has the right to critique the quality of products or services. *Doré*⁴¹⁴ also upholds the right of a lawyer to critique a judge, but restricts the parameters of the expressive activity by ruling that that such critique be delivered with a degree of civility expected of the profession.

⁴⁰⁸ *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at para 12.

⁴⁰⁹ *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8.

⁴¹⁰ *R. v. Guignard*, [2002] 1 S.C.R. 472, 2002 SCC 14.

⁴¹¹ *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8.

⁴¹² *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8.

⁴¹³ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

⁴¹⁴ *Doré v. Barreau du Québec*, 2012 SCC 12.

Despite the conditional right to dissent and the commentary on civility in *Doré*, the courts have articulated in other contexts that expression need not be civil. Colourful and dynamic speech is protected speech. It is not merely polite speech that warrants protection. The Ontario Court of Appeal articulated:

Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved.

The concept of free and uninhibited speech permeates all truly democratic societies...The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas.⁴¹⁵

The Courts have also articulated justifiable limitations on expression, including the regulation of hate speech, obscenity, defamation and libel. Obscenity laws prevent the dissemination of materials deemed harmful to society, such as pornographic materials depicting violent acts against women⁴¹⁶ and child pornography.⁴¹⁷ Defamation legislation, in tort law, limits or imposes penalties for expressive activities that cause damage to reputation. The Supreme Court upheld the constitutionality of libel crime law in Canada indicating that libellous or slanderous acts can harm the dignity of an individual⁴¹⁸ and thus merit "scant protection."⁴¹⁹ While false information is not in itself grounds for tortious claims of libel, it is if it is considered defamatory and thus criteria were established to ensure that journalists engage in "responsible communication."⁴²⁰ Cameron (2010) argues that, in the earlier years, the Supreme Court "got its priorities wrong and put reputation ahead of expressive freedom" in taking such strong measure to condemn

⁴¹⁵ *R. v. Kopyto* 1987 CanLII 176 (ON CA), (1987), 24 O.A.C. 81.

⁴¹⁶ *R v. Butler*, [1992] 1 S.C.R. 452.

⁴¹⁷ *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2.

⁴¹⁸ *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130.

⁴¹⁹ *R. v. Lucas*, [1998] 1 S.C.R. 439.

⁴²⁰ *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61.

potentially defamatory expression.⁴²¹ However, more recent court rulings have provided some redirection to defamation law, emphasizing the importance of critique and debate. In 2008, the Supreme Court upheld the defence of “fair comment,”⁴²² indicating the importance of public critique and defence in a democratic society. Unfortunately, SLAPPs (Strategic Lawsuits against Public Participation) can be strategically used against critics of corporate or government activities with little protection for individuals or public interest groups who face vexatious defamation suits from governments or corporations attempting to silence criticism.⁴²³

In terms of where expressive activities are protected, the Supreme Court has determined that expressive freedoms are protected in some, but not all, physical spaces – mainly public spaces. Parks and streets, and even airports are areas where freedom of expression is protected;⁴²⁴ so too is public transit.⁴²⁵ Posters are also protected on some public property.⁴²⁶ Some public spaces have been limited for the purpose of protecting other rights. For example, expression can be justifiably limited in public spaces to minimize noise pollution,⁴²⁷ or to ensure women safe access to abortion services.⁴²⁸

⁴²¹ Cameron, 2010, p. 134.

⁴²² *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420.

⁴²³ Quebec is the only region in Canada that has adopted anti-SLAPP legislation. See Quebec National Assembly. Bill 9 (2009, Chapter 12) *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*. Amending *Code of Civil Procedure* (R.S.Q., chapter C-25). British Columbia briefly had anti-SLAPP legislation, which was enacted in 2004, but then repealed when the provincial Liberals came into power. For more information on Anti-SLAPP legislation in Canada, see Kevin Marron. “SLAPPs on the Wrist,” (2010) *Canadian Lawyer*. January; and; Vincent Pelletier. “Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)” (2008) presented to the Uniform Law Conference of Canada.

⁴²⁴ *Committee for the Commonwealth of Canada v Canada* [1991] 1 S.C.R. 139.

⁴²⁵ *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295.

⁴²⁶ *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.

⁴²⁷ *City of Montreal v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62.

Based on this brief summary of some of the key issues in freedom of expression jurisprudence, we can observe that there is an inconsistent commitment to freedom of expression in Canadian law. While there is broad recognition for the democratic purpose of freedom of expression, the commitment to dissenting expressive activities has been limited. We see this discourse extending to regulatory activities on Canadian campuses.

Student Discipline and Regulation on Canadian Campuses

Numerous variables affect speech and expression on campus. Behaviour regulation is becoming more prevalent, which is as a result of responses by universities to diverse interests and pressures. Codes of behaviour have been broached as a response to discrimination and harassment on campuses, but they also seem to stem from efforts to prevent litigation or to protect an institution's reputation. Stewart (2010) argues that "student codes of conduct are becoming part of the academic regulatory apparatus"⁴²⁹ within an educational system that is becoming increasingly intolerant of dissent. The recent notable rise in student protests indicates that the proliferation of such regulatory apparatuses may not be effective in suppressing political dissent.

Campus behaviour codes have undergone much more extensive scrutiny in the United States. With a more entrenched libertarian approach to civil liberties in the US, campus speech codes and "free speech zones" have been hotly contested, and even legally challenged, as an affront to 1st Amendment rights. The Foundation for Individual Rights in Education (FIRE), for example, focuses explicitly on evaluating whether campus speech codes hinder 1st Amendment-protected individual constitutional rights, from free speech to due process and religious freedom, and litigating against speech codes that violate student individual rights.

⁴²⁸ *R. v. Spratt*, 2008 BCCA 340; *R. v. Spratt*, 2011 BCSC 1747.

⁴²⁹ Stewart, 2010, p. 55.

In Canada, on the other hand, many provincial courts recognized the quasi-judicial powers of universities to discipline student non-academic behaviour with significant discretionary powers, and it remains disputed to what extent *Charter* standards may apply to such disciplinary processes. Therefore, it is unclear what the standard may be for protecting freedom of expression on campus, and how universities may limit expression at their discretion. As explored in Chapter 3, some recent cases in Alberta have recognized *Charter* protected expressive freedoms on campus, whereas the Ontario courts have been less inclined to entertain *Charter* claims. The courts have generally affirmed that universities have the administrative authority to discipline students, but that such processes only need to abide by standards of procedural fairness, human rights legislation, and contractual commitments.

Returning to *Pridgen v. University of Calgary*⁴³⁰ to explore its significance in the context of expression on campus, the case brings new and significant jurisprudence on student disciplinary policies and *Charter* analysis. At the Queen's Bench, Justice Strekaf ruled that, while universities are entitled to discipline student non-academic behaviour, freedom of expression needs vigilant protection in the University:

I cannot accept that expression in the form of criticism of one's professor must be restricted in order to accomplish the objective of maintaining an appropriate learning environment...As an educational institution, the University should expect and encourage frank and critical discussion regarding the teaching ability of professors amongst students, even in instances where the comments exchanged are unfavourable.⁴³¹

Justice Strekaf's decision has already influenced another Alberta decision, *R. v. Whatcott*,⁴³² which concluded that free speech is protected for all on campus, not just students.

⁴³⁰ *Pridgen v. University of Calgary*, 2012 ABCA 139; *Pridgen v. University of Calgary*, 2010 ABQB 644.

⁴³¹ *Pridgen v. University of Calgary*, 2010 ABQB 644 at para. 82.

⁴³² *R. v. Whatcott*, 2011 ABPC 336.

The Alberta Court of Appeal concluded that a balance must be struck between protecting a student's right to "criticize, comment on or refute the quality of education he or she receives" and ensuring a respectful learning and work environment.⁴³³ Judge Paperny wrote that while "the University must be able to place reasonable limits on speech on campus in order...to maintain a learning environment where there is respect and dignity for all," she added that "criticism and debate are essential to ensuring the place of universities as centres for discussion."⁴³⁴

The case has prompted concern that, not only the University of Calgary, but the AUCC and University of Alberta, stepped in to defend the right of post-secondary institutions to act outside of a commitment to freedom of expression. University of Calgary law professor Peter Bowal challenged the universities to recognize student expressive rights. He wrote to the *Calgary Herald*:

Why does the University of Calgary have to run the test case, arguing that [the *Charter*] should not apply? Why not respect freedom of student expression on campus as a value, even if the Supreme Court of Canada has not compelled it as a matter of law?...Free the students. Let them speak and argue. This is the lifeblood of democracy.⁴³⁵

Within this context of disparate jurisprudence asserting pan-Canadian *Charter* protection for campus expressive activities, students and faculty should focus their efforts into asserting on principles of freedom of expression and academic freedom at an institutional level. The academic community will need to continue to both challenge institutional policies and practices that limit expression while also proactively and assertively promoting critical debate and inquiry in practice.

⁴³³ *Pridgen v. University of Calgary*, 2012 ABCA 139 at para 127.

⁴³⁴ *Pridgen v. University of Calgary*, 2012 ABCA 139 at para 124.

⁴³⁵ Peter Bowal "University of Calgary must free its students" (16 May 2012) Comment, *Calgary Herald* A15.

Student Discipline, Dissent, and Power Relations in the Academy

Dyson (2000) commented that “[a]s a code of conduct, a university’s harassment policy may be seen as evidence of a moral system that values certain behaviours over others.”⁴³⁶ In this respect, she contends that regulating expression or academic freedom without recognizing power relations in the academy can have the affect of trumping equity. Further, Dyson argues that, without accounting for power relations, principles of neutrality and balance in expression can veil their role in perpetuating structural inequalities.

Students, as a group with little economic power or political influence, have historically employed tactics such as picketing, information leafleting, and other forms of direct action, in combination with other forms of representation and advocacy, to influence public opinion and decision-makers. From encouraging divestment in South African Apartheid⁴³⁷ to seeking car-free roads on campus,⁴³⁸ creative and direct tactics have been used to draw attention to and convince others of various causes. For example in 1972, undergraduate students at the University of Toronto occupied Simcoe Hall, the central administration building, to protest against their exclusion from accessing Robarts Library. The University conceded and, as a result, undergraduates to this day are allowed to access the campus library. The Canadian Civil Liberties Association

⁴³⁶ Diane Dyson, “Meeting the Challenge of Religious Fundamentalism: How Far Do Liberal Principles of Tolerance Go?,” Sharon E. Kahn and Dennis Paylich, eds. *Academic Freedom and the Inclusive University*. (Vancouver: UBC Press, 2000) p. 123.

⁴³⁷ Alroy Fonseca, “Looking back at Carleton’s divestment from South Africa” (22 January 2010) *Rabble.ca* Online: [rabble.ca <http://rabble.ca/news/2010/01/looking-back-carletons-divestment-south-africa>](http://rabble.ca/news/2010/01/looking-back-carletons-divestment-south-africa).

⁴³⁸ Daniel Viola, “Ryerson celebrates permanent pedestrian zone on Gould Street” (29 March 2012) *Spacing Toronto*. Online: [Spacing Toronto <http://spacingtoronto.ca/2012/03/29/ryerson-celebrates-permanent-pedestrian-zone-on-gould-street/>](http://spacingtoronto.ca/2012/03/29/ryerson-celebrates-permanent-pedestrian-zone-on-gould-street/).

highlighted in a 2011 letter how student protests have been at the forefront of many social movements:

Student protests have long been an important part of a variety of social movements and freedom of expression and peaceful assembly on campus are core values that should be protected and defended by all members of a university community.⁴³⁹

However, with the increasing adoption of codes of conduct, are Canadian campuses fully committing to the democratic purpose of student political expression? Or are they limiting possibilities for student participation in social and institutional change?

York University is one campus with a long history of heated political debates and militant student and labour groups. It is also a campus recognized for its ethnically and racially diverse student body and its reputation for lively debates and clashes, especially on the Israeli/Palestinian debates. Several criticisms have emerged about how external influences pressure university administrators to use regulatory policies to stifle debate about controversial topics, especially in relation to Middle East politics.⁴⁴⁰ In 2004, Daniel Freeman-Maloy, a pro-Palestinian student activist, was suspended from York University for three years, outside of the regular processes for disciplining students.⁴⁴¹ Shortly after this incident, space booking policies were modified at the University, making it more difficult for student and community groups to book space for events – a move that was criticized for impeding expressive activities on campus.⁴⁴² Incidents around the 2009 conference “Israel/Palestine: Mapping Models of Statehood and Paths to Peace”, hosted

⁴³⁹ Canadian Civil Liberties Association “CCLA Concerned about Police Presence During Campus Protest” (16 December 2011) News Release online: Canadian Civil Liberties Association <<http://ccla.org/2011/12/16/ccla-concerned-about-police-presence-during-campus-protest/>>.

⁴⁴⁰ See Thompson, 2011; Evelyn Hambdon and Scott Harris, “Dangerous Dissent? Critical Pedagogy and the Case of Israeli Apartheid Week”, (2010) *Cultural and Pedagogical Inquiry* 2 (2), Special Issue, 62-76; Mary-Jo Nadeau and Alan Sears, “The Palestine Test: Countering the Silencing Campaign” (Spring 2010) 85 *Studies in Political Economy* 7; David Noble. 2005. “The New Israel Lobby in Action,” (November, 2005) *Canadian Dimension* 8.

⁴⁴¹ *Freeman-Maloy v. Marsden*, 79 OR (3d) 401 [2006] OJ; *Lorna Marsden, York University and the Board of Governors of York University v. Daniel Freeman-Maloy*, 2006 CanLII 31716 (SCC).

⁴⁴² Noble, 2005; Woodhouse, 2009.

by York University, indicate that years later, continued pressures to steer the research and debates around Israel/Palestine remain.⁴⁴³

The perceived regulation of critique and inquiry of Middle East politics has become of such a concern to Nadeau and Sears (2010) that they established "The Palestine Test" as an analytical method for evaluating campus commitment to academic freedom, social justice, and freedom of expression in the context of critical inquiry of Israel/Palestine relations. They argue that there has been a "silencing campaign" against Palestinian solidarity on Canadian campuses. In their article, they apply this analysis to critique York University's "Report of the President Task Force on Student Life and Community,"⁴⁴⁴ which resulted from complaints arising from Israeli Apartheid Week on the campus. The report recommends a Standing Committee on Campus Dialogue, expanded study space, amendments to the *Student Code of Conduct*,⁴⁴⁵ and better enforcement of space booking policies. Nadeau and Sears characterize the report as a product of this very type of silencing campaign in the context of an increasingly outspoken Palestinian human rights movement. The Report focused on how the application of the *Student Code of Conduct* could be used to ensure "meaningful dialogue" and "civility" in debates, a concept later affirmed by the Hon. Iaccobucci in his report on the Mapping Models Conference.⁴⁴⁶ Nadeau and Sears, however, conclude

⁴⁴³ Masri, 2011; Thompson, 2011.

⁴⁴⁴ Presidential Task Force on Student Life. "Rights and Responsibilities Within The University: Report of the Presidential Task Force on Student Life, Learning & Community" (31 August 2009) York University online: York University
<<http://www.yorku.ca/vpstdnts/initiatives/taskforce/report/index.html>>.

⁴⁴⁵ *Code of Student Conduct*, York University Online:
<<http://www.yorku.ca/oscr/codeofconduct.html>>.

⁴⁴⁶ The Honourable Frank Iaccobucci, "The Mapping Conference and Academic Freedom: A Report to the President Mamdouh Shoukri from the Honourable Frank Iaccobucci," (March 2010) Online: York University <<http://president.news.yorku.ca/2010/04/09/president-releases-iacobucci-report-on-israelpalestine-conference/>>

that the application of these concepts of meaningful dialogue and civility “can be used to derail debate, silence advocacy, and depoliticize campuses,”⁴⁴⁷ thus having the opposite effect of what universities purport to promote.

Following the Task Force, York University initiated a “safe speech” poster campaign to discourage political confrontations on campus. Extending far beyond condemning harassment, discrimination, or expressive activities conveying violence, the poster campaign encouraged a level of “civility” or politeness that raised concerns that controversial debate and the expression of minority views, which are *Charter* protected activities, were at risk of being stifled. The posters tote phrases such as:

“Words have a way of hitting innocent bystanders.”
“A war of words is still a war.”
“It’s not just what you say, but how you say it.”
“Nothing kills ideas like an explosive argument.”

The “safe speech” campaign was of such concern to former General Counsel of the Canadian Civil Liberties Association, Alan Borovoy, that he came out of retirement to comment on what the campaign indicates about the state of expressive freedoms on Canadian campuses:

Freedom of speech is falling out of favour on a lot of Canadian campuses with the restrictions of codes of speech and conduct...But the moral need to be respected must be accompanied by the legal right to be disdainful.⁴⁴⁸

Similar questions and accusations of “decency and decorum” have become an issue in the activities of the “Genocide Awareness Project” – an anti-abortion group – which uses images of genocide and photos of aborted fetuses to liken abortion to the Holocaust and other genocidal regimes. Students and other anti-abortion activists have also been arrested, charged under codes of conduct and trespass acts, in efforts to regulate or limit access to these displays. Students’ unions and university administrations alike have

⁴⁴⁷ Nadeau and Sears, 2010, p. 16

⁴⁴⁸ Louise Brown, “York poster campaign attacks ‘war of words’” (6 October 2009) *Toronto Star* online: <www.thestar.com>.

been challenged on how to appropriately address the complaints that result from the materials that are considered offensive, disturbing, and otherwise graphic, while maintaining principles of free expression.

While questions of free speech on these activities are validly raised, it would be inappropriate to regard the "Genocide Awareness Project" which is heavily funded by wealthy donors and the American anti-choice organization, Centre for Bioethical Reform,⁴⁴⁹ under the same light as Palestinian human rights campaigns. In fact, this comparison provides an opportunity to consider the relativity of academic freedom, free speech, and power. As Masri (2011) writes: "The level of protection [for academic freedom] in fact varies according to the power that interested parties wield and the identities at play, and the vulnerability of scholars is usually a reflection of the current power dynamics in the nonacademic world."⁴⁵⁰ Given the significant external funding for the GAP, it is more likely to be able to challenge arrests and take these matters to the media and the courts than other political movements may be able to do. While it is important to recognize the political-economic differences fueling various positions on campus debates, I would argue that it is still more effective to encourage the debate. If it is as offensive as many so believe, then opponents ought to articulate the offensiveness of the analogies made between genocide and abortion, to correct misinformation, and to challenge the ethical presuppositions.

Considering the example of the GAP, incidents related to their "holocaust" displays and other controversial figures that may come across the campuses can emphasize the important role of the counter-protest, which may often be spontaneous. Universities should respond by facilitating access to spaces for debate and

⁴⁴⁹ For more information, see the Canadian Centre for Bio-Ethical Reform. Online: <<http://www.cbrinfo.com/gap.html>>.

⁴⁵⁰ Masri, 2011, p. 1.

disagreement. In some ways, the egregious and offensive analogies between abortion and genocide are best addressed by debating the ethical, political, economic, and social merits of the GAP, rather than providing a platform to such organizations to decry censorship and threats to free speech. The Genocide Awareness Project, and critiques against it as racist and misogynist, provide an opportunity to question what constitutes hate propaganda; to examine the discourse of militarized acts of violence vis-à-vis questions of women's reproductive justice; and, other important questions around colonialism, socio-economic inequality, and bioethics related to abortion.

As has been the case with many of the complaints vocalized by anti-abortion activists on campus, codes of conduct are not the only policies that are under criticism for limiting debate on campus. Many campuses have been modifying space booking policies, making it more difficult for student groups to book rooms and hold events on campus. Anti-trespass and other policies have also been applied, particularly in the case of non-students.

Western University also recently made headlines when it banned two community organizers from campus, citing trespass laws.⁴⁵¹ According to Western University's own communications paper, between 25 and 30 people are banned from campus each year. The two bans came after a group of individuals and students staged a peaceful demonstration in response to an "Israel on Campus" event in February 2012.⁴⁵² There was no notice given for the demonstration, making it unauthorized under the University Student Council's "Controversial Events Policy" that requires a minimum of 10 days

⁴⁵¹ Jason Winders, "University upholds campus bans," (24 May 2012) *Western News*. Online: Western News
<http://communications.uwo.ca/western_news/stories/2012/May/university_upholds_campus_bans.html>.

⁴⁵² "Protestor banned from Western University" (9 April 2012) *Macleans on Campus*, online:
<<http://oncampus.macleans.ca/education/2012/04/09/protester-banned-from-western-university/>>

notice for any event deemed controversial to allow time for both the Student Council and the University to review the event and to "make appropriate preparations to ensure public safety."⁴⁵³ Western University's Policy 1.5, *Picketing, Distribution of Literature and Related Activities*, requires that demonstrations "cause no interference with the orderly functioning of the university nor infringement on the rights or privileges of others, which includes the right to peaceful pursuit of campus activities and to enjoy the rule of law."⁴⁵⁴ The Canadian Civil Liberties Association wrote to the University urging that the bans be reversed:

Universities are uniquely situated to educate their communities of the need to protect freedom of speech and to facilitate open, thoughtful, and even disturbing dialogue and debate on what are often the most contentious issues of our day. A fundamental role of universities is to provide settings in which ideas and opinions can be freely expressed in order to further public discourse, not to limit it.⁴⁵⁵

The restrictions placed by both Western University and the student council, which require advance notice and consideration, go too far to limit freedom of assembly and expression, serving to limit a wide range of spontaneous expressive activities that may happen on the campus.

Returning to the matter of political expression around Israel/Palestine, efforts to limit debate and discussion have raised concern that "anti-harrassment" discourse has been distorted to carry through with this "silencing campaign" as articulated by Nadeau

⁴⁵³ University Students' Council Building Usage Policy, Online:
<<http://www.usc.uwo.ca/studentlife/documents/Building%20Usage%20Policy.pdf> >
5.03 Peaceful protests are permitted so long as they:

- (1) Do not occur on the same day as the programmed event affiliated with the counter-argument,
- (2) The group involved with or organizing the protest has not been previously denied the booking space for that day due to the counter-programming nature of its presentation,
- (3) Do not infringe on space otherwise utilized, and
- (4) Hold a reasonable degree of interest to members of the UWO community.

⁴⁵⁴ Western University policy, Section 1.5 Picketing, Distribution of Literature and Related Activities, Online: <<http://www.uwo.ca/univsec/mapp/section1/mapp15.pdf>>.

⁴⁵⁵ Letter to Western University President Dr. Amit Chakma from the Canadian Civil Liberties Association (17 April 2012) online: Canadian Civil Liberties Association <www.ccla.org>.

and Sears. The phrase "Israeli Apartheid" has been characterized by some politicians and other critics as "hate speech" and that those who use this term are thereby implicated in hate speech or anti-Semitism. The actions undertaken by politicians and university administrators to limit the discussion has ranged from the explicit, such as motions in legislatures and news releases from politicians denouncing "Israeli Apartheid Week,"⁴⁵⁶ to banning an illustrated poster depicting a helicopter (labeled Israel) aiming a missile at a child (labeled Gaza) at four campuses critiqued as "the unilateral suspension of normally sanctioned liberal freedom of speech across four campuses,"⁴⁵⁷ to more covert efforts, such as in the alleged misuse of space booking policies and security fees to obfuscate speakers and events.⁴⁵⁸ These activities, occurring on Canadian campuses, are reflective of concerns already raised at length by American counterparts who have chronicled influences to stifle academic scholarship around Israel/Palestine.⁴⁵⁹ As a response to the poster ban and subsequent threats against students who were members of Students Against Israeli Apartheid that they would face conduct charges if they were found to be circulating the banned poster, a human rights complaint was launched against Carleton University.⁴⁶⁰

⁴⁵⁶ "Odious' Israeli Apartheid Week condemned: Yearly campus event denounced by politicians as a ruse for racism" (3 March 2010) *Maclean's OnCampus* Online: Maclean's OnCampus <<http://oncampus.macleans.ca/education/2010/03/03/odious-israeli-apartheid-week-condemned-by-politicians/>>.

⁴⁵⁷ Nadeau and Sears, 2010, p. 25 (The four campuses to ban the Israeli Apartheid Week poster were: Carleton University, University of Ottawa, Wilfrid Laurier University, and Trent University).

⁴⁵⁸ See for example: Liisa Schofield, "Exposed: University of Toronto Suppresses Pro-Palestinian Activism" (19 February 2009) *Socialist Project* E-Bulletin No. 188 online: Socialist Project <<http://www.socialistproject.ca/bullet/bullet188.html>>; Valerie Hauch, "Injunction sought to force Mohawk College to allow lecture" (16 February 2011) *Toronto Star* online: Toronto Star <<http://www.thestar.com/news/gta/article/940314--injunction-sought-to-force-mohawk-college-to-allow-lecture>>.

⁴⁵⁹ See for example, Schrecker, 2010; O'Neil 2008; Nocella et al 2010; Butler, 2003.

⁴⁶⁰ "Students file human rights complaint" (28 August 2009) *The Charlantan* online: The Charlantan <<http://www.charlatan.ca/2009/08/students-file-human-rights-complaint/>>.

Harris and Hambdon (2010) argue that these activities are highly coordinated and that universities apply (and share advice with other university administrators on how to apply) administrative policies, such as space booking policies and student codes of conduct so to thwart attempts by Students Against Israeli Apartheid, and other student groups working on Palestinian human rights campaigns, to book space for their events on campus. They argue that significant strategic efforts are being undertaken and coordinated between external political pressures and university regulations to quell critical discussion on Palestinian human rights:

Such high-level coordination suggests that more than merely the innocuous enforcement of student code of conduct and room booking rules, administrators at the highest levels of major Canadian universities view the dissent expressed by Palestinian activists as significant enough to warrant coordinated strategies and responses on a regional level. It is this apparently intentional closing down of space on campuses for dissenting perspectives that provides evidence...that these actions reflect a particular ideological position.⁴⁶¹

Some of these pressures include threats by external organizations to undermine donor relations activities if events promoting Palestinian human rights continue to take place. In 2009, for example, B'Nai Brith, a Jewish advocacy organization, purchased ads in the *National Post* stating "Stop the Hate Fests on Canadian University Campuses" and called for Israeli Apartheid Week events to be cancelled on campus and encouraged donors to withhold funding from universities where such events were held.

Instead of overtly cancelling events as suggested by B'Nai Brith, some universities have been suspected of employing questionable application of space booking policies to curb controversial events. Even though students have decried the application and modification of space booking policies as a violation of their expressive activities on campus, at least in Ontario, there does not appear to be willingness to

⁴⁶¹ Harris and Hambdon, 2010, p.69.

consider this question in the courts. In *Lobo v. Carleton*⁴⁶² an appeal on whether students who were arrested at Carleton University could claim *Charter* violations was dismissed as space booking policies are not under *Charter* scrutiny. The Ontario Court of Appeal ruled: "when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*."⁴⁶³

And while critics have exposed influence by private organizations, as has already been noted, governmental pressures to intervene in campus debates have also become more overt. The federal government formed a non-parliamentary committee, "Canadian Parliamentary Coalition to Combat Anti-Semitism" (CPCCA), which released a report alleging that growing "anti-Semitism" on Canadian campuses is stifling speech of students of Jewish descent and others who challenge Palestinian perspectives.⁴⁶⁴ The report claims increasing "anti-Semitic" incidents on campus, such as the production of posters for Israeli Apartheid Week and other events criticizing Israeli policies. Adopting the following definition of "apartheid", the report states:

The use of the term "apartheid" is...a denial of the Jewish people their right to self-determination...by claiming that the existence of a State of Israel is a racist endeavour.⁴⁶⁵

The CPCCA makes a series of recommendations that fall short of banning "Israeli Apartheid Week". They acknowledge that to ban the events would violate free speech, but the report instead seeks for administrators to exercise strict use of Codes of Conduct to limit controversial debate, enforce security measures for speakers, and publicly

⁴⁶² *Lobo v. Carleton University*, 2012 ONCA 498 (CanLII).

⁴⁶³ *Lobo v. Carleton University*, 2012 ONCA 498 (CanLII) at para 4.

⁴⁶⁴ Canadian Parliamentary Coalition to Combat Anti-Semitism, "Report of the Inquiry Panel of the Canadian Parliamentary Coalition to Combat Anti-Semitism," (7 July 2011). Online: Canadian Parliamentary Coalition to Combat Anti-Semitism <www.cpc.ca>.

⁴⁶⁵ *Ibid.* p. 52.

denounce Israeli Apartheid Week.

It is not only governmental influences proposing stricter administrative student behaviour codes to influence campus Israeli Apartheid Week and related events, but business and legal professionals as well. They recently formed an organization called "Advocates for Civil Liberties" aimed at influencing campus policies in order to affect discussions around Israel. Its February 2011 founding conference entitled "When Middle East Politics Invade Campus" was identified as "an important step in fighting the war against Jewish students on campus."⁴⁶⁶ According to its website, Advocates for Civil Liberties:

seeks to collaborate with academic officials to devise appropriate, enforceable ground rules for campus political activities. Increasingly, demonstrations such as, but not limited to, the upcoming "Israeli Apartheid Week" on campus, create a hostile atmosphere, and one that stifles the genuine exchange of views on sensitive Middle East issues.⁴⁶⁷ [Emphasis added]

But critics have argued that there is a growing tendency to conflate "anti-Semitism" - the hatred or violence against individuals of Jewish descent - with valid criticisms and constructive debates of Israeli policies or actions and co-opt anti-discrimination language to cleanse debates on the Israeli/Palestinian conflict.⁴⁶⁸ Free Expression Palestine (PFEX), a group of students, scholars, community activists, and legal workers criticizes the CPCCA in particular for using the term of "anti-Semitism" for a broad set of activities that are aimed to stifle meaningful political debate and dissent about the state of Israel:

The CPCCA's attempt to conflate criticism of Israel with traditional understandings of anti-Semitism threatens to seriously circumscribe free speech on Israel/Palestine by setting a "new normal" for institutional silencing, and by laying groundwork for incorporating such a

⁴⁶⁶ See online <<http://www.advocatesforcivilliberties.org/>>.

⁴⁶⁷ Fern Sidman, "Advocates for Civil Liberties Hold First Forum: Jews Fight Back" (20 February 2011) *Israel National News* Online: <<http://www.israelnationalnews.com/News/News.aspx/142416#.TxYhc0qO5ZY>>.

⁴⁶⁸ Judith Butler, "No, it's not anti-Semitic." (2003) *London Review of Books*, August 21, 2003 pp. 19-21. Online: <<http://www.lrb.co.uk/v25/n16/judith-butler/no-its-not-anti-semitic>>.

definition into Canadian hate-crimes legislation.⁴⁶⁹

Jenson (2010) argues that such tactics to cloak efforts to silence dissenting views in progressive language have been utilized by neo-conservative groups in the U.S., such as "Students for Academic Freedom":

Especially brilliant is the cooptation of the concept of diversity to argue that conservative forces...are barely surviving under the jackboot of Stalinist intellectuals. The strategy of the right seems to be fairly clear: To avoid looking fascistic, these groups cloak themselves in an odd combination of core Enlightenment values (the importance of the university as an open intellectual space) and a caricatured postmodern relativism (everybody's truth is valid, so the goal is simply balance because no definitive judgments are possible).⁴⁷⁰

Nadeau and Sears explain that what is unfortunate about such activities is that they do more to silence questions of racism and anti-Semitism on campus and in society than to eliminate them.

Harassment, Discrimination, and Free Speech on Campus

Applying a critique of the threats to political speech and activity on campus should not underplay the very important challenges of eliminating discrimination and harassment, as well as eradicating violence and hate, on Canadian campuses. In fact, students are often the most outspoken against racism, religious discrimination, gender phobias, and other forms of discrimination.⁴⁷¹

Critical race theorists defend speech regulations on the premise that, while free speech is necessary for protecting especially the speech of those who are historically marginalized, the free and unfettered allowance of racist or homophobic or other hateful

⁴⁶⁹ *The CPCCA's Hidden Message: Silencing Criticism of Israeli Apartheid. A Critical Report on the Canadian Parliamentary Coalition to Combat Anti-Semitism.* (May 2010) Palestine Freedom of Expression campaign. Toronto, Canada online: <www.freeexpressionpalestine.org> p. 5.

⁴⁷⁰ Jenson, 2010, p. 169.

⁴⁷¹ The "Students United Against Racism" campaign aims to eliminate Islamophobia, Anti-Semitism, and Racism. See Online <noracism.ca>; CFS-Ontario and the Lesbian, Gay, Bi, Trans Youthline also launched the "Challenge Homophobia and Transphobia" campaign in early 2012. Online: Canadian Federation of Students-Ontario <<http://cfsontario.ca/en/section/193>>.

slurs serve to silence those minorities who need the protection of free speech the most.⁴⁷² Supporters of regulating speech argue that limiting speech is necessary and justifiable to prevent discrimination and systemic inequalities.⁴⁷³

Constitutional law theorist, Richard Moon, agrees with the restrictive regulation of hate speech, but only at its most extreme level. He cautions against significant regulation of what would be considered discriminatory speech, arguing for fostering public debate on issues, rather than stifling it through restrictive legislation:

[S]tate censorship of hate speech should be confined to a narrow category of extreme expression...At the same time less extreme forms of discriminatory expression, should not simply be censored out of public discourse... Because they are so pervasive, they are better to be addressed and confronted rather than censored.⁴⁷⁴

Nathalie Des Rosiers of the Canadian Civil Liberties Association argues that it is possible, even necessary, to promote anti-discrimination frameworks while asserting robustly protecting free expression. The promotion of free speech, thus, must come with a responsibility to denounce hateful or discriminatory expressive activities. She articulates:

Being pro-free speech does not mean being pro-hate, it must mean being an advocate. One can refuse to ban speech but must then decide to challenge it and to undermine it. The best way to firmly protect a society against discrimination and anti-Semitism is to invest firmly in its democratic and human rights reflexes. It could very well be that the responsibilities that come with wishing to live in a free society: one must work for both liberty and equality.⁴⁷⁵

Thus, this responsibility to both liberty and equality, as difficult as it may sometimes be to balance, must be the focus of anti-discrimination policies on campus.

⁴⁷² Mari J. Mastuda et al, eds, *Words that wound: critical race theory, assaultive speech, and the First Amendment*. (Boulder, Westview Press, 1993).

⁴⁷³ see for example, *Saskatchewan Human Rights Commission v. William Whatcott, et al.* [Currently before the SCC], LEAF intervening factum at para 9.

⁴⁷⁴ Richard Moon, "Attack on Human Rights Commissions and the Corruption of Public Discourse" (2010) 73 *Sask. L. Rev.* at 94.

⁴⁷⁵ Nathalie Des Rosiers, "Rejecting Hate—Responsibility for Equality in a Free Society," (2010) 8:4, *Canadian Diversity – Diversité canadienne* 49.

The Ontario Human Rights Tribunal recently considered the intersection of discrimination and expressive freedoms in the university context in *McKenzie v. Isla*.⁴⁷⁶ Isla, a university professor outspoken about her criticisms of the Catholic Church, had engaged in unfriendly debate with an employee, McKenzie, of a Catholic-run program on the campus. McKenzie alleged discrimination against him based on his religious beliefs. The tribunal dismissed the complaint and provided the following important commentary on public debate in the university setting:

... given the importance of academic freedom and freedom of expression in a university setting, it will be rare for this Tribunal to intervene where there are allegations of discrimination in relation to what another person has said during a public debate on social, political, and/or religious issues in a university.⁴⁷⁷

The adjudicator further commented on the right to critique powerful institutions, in this case the Catholic Church:

The applicant's main allegation is that the respondent harassed him and poisoned his work environment because of his religious beliefs, specifically, his pro-life beliefs...I disagree. The Catholic Church is one of the most powerful religious institutions in the world, and is sometimes criticized by both Catholics and non-Catholics for its views on contentious issues.⁴⁷⁸

It was ultimately recognized by the adjudicator that the applicant may have been treated differently because of his religious beliefs and about the merits of the religious program for which he worked, but that his feelings of personal offense did not amount to discrimination:

...Although the respondent clearly treated the applicant differently because of his religious beliefs, in the context of the debate that was taking place within the University about the merits of the SEA program, which the applicant had administered and continues to support, I cannot see how the respondent's comments about him were vexatious, or known or ought reasonably to be known to be unwelcome, no matter how personally offensive and hurtful he found them to be. Accordingly, the respondent's comments did not amount to substantive discrimination.⁴⁷⁹

⁴⁷⁶ *McKenzie v. Isla*, 2012 HRT0 1908 (CanLII).

⁴⁷⁷ *McKenzie v. Isla*, 2012 HRT0 1908 (CanLII) at para 35.

⁴⁷⁸ *McKenzie v. Isla*, 2012 HRT0 1908 (CanLII) at para 36-37.

⁴⁷⁹ *McKenzie v. Isla*, 2012 HRT0 1908 (CanLII) at para 43.

This tribunal decision provides important commentary on how critique and debate, even that which is offensive, must be respected on campuses. It further highlights the importance of recognizing the difference between the critique of large institutions, such as governments or religious institutions, and what is personal harassment and discrimination. This differentiation must be clearly understood by university administrations in their use of anti-discrimination and harassment policies.

Returning to some of the work in the United States challenging speech codes, there are accusations that some university and college administrators permit widespread censorship under the guise of discrimination. The Foundation for Individual Rights in Education (FIRE) does not oppose the prohibition of criminal behaviour; rather they argue it is necessary to distinguish genuine anti-harassment codes from what FIRE identifies as “disguised” speech codes. Disguised speech codes, they argue, are those codes of conduct which have broad sweeping policies against verbal conduct, which they argue are too susceptible to the arbitrary political suasion of those interpreting them. Such speech codes, FIRE argues, may be implemented in the name of “anti-discrimination” or “diversity” but are then used to punish unpopular speech. In *FIRE’s Guide to Free Speech on Campus*, Silvergate et al maintain:

Universities must prohibit illegally extreme behaviour on their campuses. Nationwide, however, college administrators have taken advantage of this narrow category in order to impose a vast scheme of censorship over their institutions, intentionally suppressing whole areas of discussion and protected communication on our campuses...[T]here are codes that claim to ban discriminatory harassment but that, in fact, ban constitutionally protected speech and expression. Universities commonly call these disguised speech codes ‘discriminatory harassment codes’ or ‘harassment policies’ to convince people that they do not pose First Amendment problems.⁴⁸⁰

The Association of American University Professors (AAUP) policy on speech codes also takes an even more absolutist position, opposing the regulation of any speech on

⁴⁸⁰ Silvergate et al, *FIRE’s Guide to Free Speech on Campus*. Foundation for Individual Rights in Education. (2011) online: Foundation for Individual Rights in Education <www.thefire.org>.

campuses on the basis that “[n]o viewpoint or message may be deemed so hateful or disturbing that it may not be expressed.”⁴⁸¹ They propose instead that protocol ought to focus on regulating offensive behaviour instead of speech. Further, the AAUP proposes that, in order to combat harassment and discriminatory behaviour, post-secondary institutions ought to highlight:

the means they use best—to educate—including the development of courses and other curricular and co-curricular experiences designed to increase student understanding and to deter offensive or intolerant speech or conduct. These institutions should, of course, be free (indeed encouraged) to condemn manifestations of intolerance and discrimination, whether physical or verbal.⁴⁸²

Dorothy E. Smith (2000) also argues for the critique of racism in the academy as an important method to unveil how regulatory discourses can be used to inhibit critical speech. She argues: “Critiques of racism in the university recover the otherwise shadowy deposits of empire and subjugation in the university’s everyday life and the disciplines it reproduces.”⁴⁸³ However, Smith’s critique is more focused on turning the critique of racism against the university itself to articulate the ways that it uses principles of liberty and equality to perpetuate regulatory and disciplinary activities that lead to self-censorship and fear of critique. Smith’s analysis assists in providing a framework for critiquing institutional regulatory systems while challenging the discursive frameworks used to justify them.

The regulation of speech as a method of preventing the proliferation of hate and discrimination cannot be properly considered outside a broader framework that challenges the systemic manifestations of power and discrimination. In the university

⁴⁸¹ “On Freedom of Expression and Campus Speech Codes,” (Adopted November 1994) AAUP Policy. Online: American Association of University Professors
<<http://www.aaup.org/AAUP/pubsres/policydocs/contents/speechcodes.htm>>.

⁴⁸² “On Freedom of Expression and Campus Speech Codes,” (Adopted November 1994) AAUP Policy. Online: American Association of University Professors
<<http://www.aaup.org/AAUP/pubsres/policydocs/contents/speechcodes.htm>>.

⁴⁸³ Smith, Dorothy E. 2000. p. 151.

context, utilizing codes of student conduct for the purpose of combating discrimination is problematic. Nor does it ensure that adjudicators adopt standards or procedures for determining discriminatory behaviour or the application of appropriate remedies. Strictly hateful activities ought to be dealt with primarily in a criminal or human rights context. We are seeing, however, critical inquiry and debate too quickly stifled in the name of preventing racism and discrimination.

Conclusion: Freeing Debate and Dissent in Academia

It is a crucial time for freedom of expression. Political debates and dissent within the academy are facing influence by powerful political and financial influencers. In this political and economic climate, educational institutions have an obligation to play a leadership role in fostering the voices of badly needed critical inquiry and public debate. They must do so by actively encouraging the debate and creating physical spaces to allow for it to occur. Unfortunately, university administrators also seem to be retreating from committing to free speech and critical inquiry. Administrators have indicated through their actions in their intervening arguments in *Pridgen* and in AUCC's revised statement on academic freedom that they are backing away from upholding high standards of expressive freedoms and recognizing the necessity to protect academic freedom as the core purpose of higher education. Codes of conduct and space booking policies that are used to obfuscate or retaliate against dissent are a further indicator of this wavering commitment to free expression.

In the face of this faltering leadership from university presidents, students and academic staff will need to act diligently to assert that their institutions continue to foster campus communities that respect and uphold broad spaces for intellectual critique and debate, both inside and outside the classroom. Of course, universities must take strong positions against discrimination and harassment. They should fully commit to eliminating

all forms of racism and discrimination that serve to marginalize and perpetuate hegemonic forms of domination. But students and faculty should be wary of policies and procedures cloaked as anti-discrimination or "respectful workplace" policies that undermine due process, civil liberties, and meaningful debate.

Codes of conduct are unlikely to singularly combat discrimination, because they risk giving too much discretionary power to administrators to regulate unpopular topics, especially without explicit responsibility to uphold *Charter* standards. They also do not aim to eliminate discrimination or harassment instead they act more as a moral code of behaviour. In this vein, the academic community needs to be observant to scrutinize between anti-harassment policies and "disguised speech codes."

Universities should focus on the implementation of meaningful anti-discrimination campaigns instead of promoting the censorship or regulation of speech, such as in the form of "safe speech" campaigns. In consideration of complaints related to discrimination and harassment, universities should be mindful of the power relations that can be embedded in discursive activities of equality and diversity that can be used to silence debate on controversial topics. As such, universities need to be wary of talking about freedom of expression as a matter of convenience, while turning a blind eye to or actively participating in the stifling and silencing of dissent. Adjudicators in student disciplinary proceedings should have appropriate educational training on anti-discrimination, human rights, academic freedom, and civil liberties. Adjudicators need to further recognize power relations in discourse around freedom of expression and academic freedom and to operate with enough autonomy to shield them from either institutional pressure or other external pressures to retaliate against unpopular speech.

Additionally, civil liberties groups need to work together with student organizations and faculty groups to ensure that speech codes, respectful workplace policies, codes of conduct and other campus policies (such as space booking policies)

do not overlook due process, collective agreements, and civil liberties. Moreover, in coalition, these groups need to come together to identify backlash activities cloaked in the discourse of equity, diversity, and discrimination, as has been extensively critiqued about the “students for academic freedom” movement in the U.S.

Codes of conduct and space booking policies are coming under criticism for limiting the opportunities for student organizing on campuses. Discrimination and harassment ought to be addressed, but in such a fashion that upholds human rights codes and due process. Universities need to uphold their responsibility to denounce hate and discrimination, to the same high standards that they protect vigorous debate, open and critical inquiry, and the unfettered development of theory about the world where we live.

Universities and colleges are spaces where broad expressive freedoms must be valued and vigorously defended – not only for an instructor’s freedom to teach, but for student participation in a vibrant and intellectually vigorous learning environment that assists both their individual and collective growth. Regardless of whether the Supreme Court determines whether universities are subject to *Charter* scrutiny in the context of student expressive freedoms, the university community ought to nonetheless strive towards fostering the highest of standards for encouraging critique, debate, and critical inquiry. In order to protect academic freedom broadly, and the freedom to teach, inquire and learn more specifically, our university communities further need to engage in rigorous discussion of the role of expressive freedoms in advancing a pedagogical environment committed to advancing knowledge for the common good.

Chapter 6: Analysis and Conclusion-Mapping the Course for the Freedom to Learn in Canadian Higher Education

If we examine some of the previous policies and practices which have historically prompted students to occupy administrative offices, stage sit-ins or other disruptions, many of those policies today would be clearly unreasonable. For example, it took over 15 years of women protesting, including crashing debates and staging sit-ins against the men's only membership policy at Hart House, for the centre to become co-ed. It took two occupations at Simcoe Hall, a petition of over 4,000 signatures, and student arrests at Robarts Library to allow undergraduate access to the library stacks.⁴⁸⁴ In the first example, students were organizing around general civil liberties and in the case of Robarts, they were seeking to assert their learning freedoms. In both instances, they exercised their freedom of assembly, expression, and association to change campus policies.

Thus considering the question of how student rights intersect with academic freedom, it is clear that there is indeed an intersection. If we accept a symbiosis between the freedom to teach and learn, then we can begin framing role-related requirements for fostering "critical independence of mind" and knowledge for the common good, as explained by Finkin and Post (2009). Students have never enjoyed "academic freedom" as a professional right, but they have certainly been involved in defending it and correspondingly expanding their own learning conditions, their liberties on campuses, and broader social struggles. Students are affected by secure academic freedom rights for their instructors and tenure so that their instructors can engage in the "authentic

⁴⁸⁴ Martin Friedland, *The University of Toronto: A History*. (Toronto: University of Toronto Press, 2002).

education” proposed by Freire (1970). For the freedom to learn, students require certain protections in their roles as students, in addition to their general liberties as citizens. Among these role related rights are: access to quality instruction, access to educational materials, access to autonomous organizing and access to campus space, participation in the collegial governance structure, due process in their academic evaluation, the right to not face academic sanctions for non-academic behaviour (especially to *Charter* protected activities), and representation. In order to foster the “critical independence of mind” articulated by Finkin and Post (2009), students must be able to have access to curriculum presented from a range of academic and ideological positions from faculty. This is not to suggest that indoctrination is permissible because it is not in the purview of public universities to engage in orthodoxy or indoctrination. However, as Giroux and Giroux (2004) distinguish:

Political education teaches students to take risks and challenge those with power, and encourages them to be conscious of how power is used in the classroom....*Politicizing* education silences in the name of orthodoxy and imposes itself on students while undermining dialogue, deliberation, and critical engagement.⁴⁸⁵

Thus, in such a framework, academic freedom permits for such risks and challenges to occur. In fact, it ought to encourage both faculty and students alike to take intellectual and ideological risks. Tenure has become the seminal condition for safeguarding such risks among academic staff. Students benefit from a professoriate whose academic freedom is secure and enables them to teach about controversial issues, even civil disobedience as Green (2003) notes. Students, on the other hand, do not and should not have such professional safeguards as tenure. So, how can their freedom to learn be safeguarded? In part, they do so in the scope of their general liberties – through asserting their ability to participate in a free and democratic society.

⁴⁸⁵ Giroux and Giroux, 2004, p. 118.

One aspect of this is through student associational activities on campus, because it offers collective strength and independence to participate in the collegial university and to advocate for their academic conditions. Students, like professors, need to be able to operate and organize collectively with security and autonomy. Students' unions may not always operate smoothly – there is indeed significant transience in their staffing and leadership – but they do operate with reasonable sophistication in comparison to many other non-profit organizations. Their responsibilities for the delivery of extended health and dental coverage, highly scrutinized elections processes, internal decisions making policies for the distribution of clubs funding and other campaigns are significant. Their ability to act autonomously and undertake advocacy without retaliation ought to be secured through legislation. Fortunately, most of the time in Canada this autonomy and security is respected. However, students need to be prepared to continue to defend their collective and autonomous organizing in the face of growing anti-union sentiments by university administrators, some students and other interested parties.

Student expressive freedoms are also necessary for fostering their practice of debate and critique. The ability to organize their own speakers, conferences, and other events on campus has been an issue of importance to students for the last century.⁴⁸⁶ These elements ought to be considered part of their role-related rights. Demonstrations, sit-ins, strikes, and other forms of disruption, civil liberties available to everyone, have been employed by students all over the world to instigate change at their universities and in civil society. As university administrations seem to be veering away from working collegially with students, and labour unions, and faculties; as a result, the decisions at governing bodies seem to be becoming ceremonial or symbolic gestures of democracy. Thus, the demonstration has come to be increasingly seen as the only resort for expressing opposition by a generation of students facing high tuition fees, debt,

⁴⁸⁶ Horn, 1999.

unemployment, sometimes deportation after being lured to Canada, and increasing corporate control on their campuses. This is not to suggest that universities ought not respond to disruptions and other acts of militancy or violence; however, the increasing extent to which dissent is responded to with security force and penalization, instead of responsiveness to the political concerns raised, requires reflection. And their ability to do so with minimal *Charter* scrutiny is cause for concern. It will be necessary for public attention to continue to be drawn to institutional policies that may violate either student learning conditions or civil liberties more generally. Civil liberties organizations and higher education advocacy organizations, labour unions, and students' unions will need to continue to be diligent on examining and drawing attention to problematic policies.

As campus student populations continue to become more diverse, consideration of how universities commit to the prevention of discrimination of all forms and reducing and responding to violence and harassment is crucial. Sexual assaults, hate crimes, and other forms of discrimination and harassment must be addressed, as even most civil libertarians agree that harassing and hateful speech requires regulation.⁴⁸⁷ And, of course, these issues are already covered by the Criminal Code⁴⁸⁸ and human rights codes. Campuses do need to be safe spaces so that marginalized students in particular are not at risk, or even in fear, of public violence on campus. Universities should act proactively to promote equity, diversity, and condemn discrimination on all grounds. However, it is important to be mindful of when efforts to curb dissent are veiled in intentions to prevent discrimination. Political behaviour can be stifled in the name of either a distorted notion of academic freedom or anti-discrimination.

⁴⁸⁷ Nadine Strossen, "Regulating Racist Speech On Campus: A Modest Proposal?" (1990) 1990:3 Duke L.J. 484.

⁴⁸⁸ *Criminal Code*, RSC 1985, c C-46.

In order to account for the contradictions between the prevention of oppression, discrimination, and harassment and limiting freedom of expression, consideration must be given to institutionalized relations of power. There are both covert and overt methods of silencing that can systemically occur in post-secondary institutions. Rebick states:

[M]ost 'chilly climate' issues are not about harassment...They are issues about marginalization, which is not the same as harassment, and issues of marginalization should not be dealt with by judicial procedures or quasi-judicial procedures. They should be dealt with by discussion, debate, education, and the introduction of new pedagogical techniques.⁴⁸⁹

Rebick also argues that equality rights were substantively advanced in society and in the university before the implementation of the *Charter* and individuals will continue to resist marginalization in the academy regardless of overt permission from the courts to do so. Thus, members of the academic community need to be cautious of placing too much confidence in increasing quasi-judicial regulatory policies to manage behaviour in the academy, even if they are implemented under the auspices of academic freedom and civil liberties. Debate, critique, and new dialogical approaches to confronting discrimination and harassment among an increasingly diverse student population will be necessary to maintain a commitment to the goals of academic freedom and civil liberties.

Safeguarding the Freedom to Learn: From Civil Liberties to Associating to Expressive Activities and Beyond

This thesis explores the relationship between academic freedom and student rights on Canadian campuses. By reviewing the origins of academic freedom in North America, I have reviewed the symbiosis between the freedom to teach and the freedom to learn. From there, I examined some contemporary issues facing students and their access to civil liberties in their campus activities in order to establish some conditions necessary for their "freedom to learn."

⁴⁸⁹ Rebick, 2000, p. 60.

In Chapter 2, I reviewed the socio-historical accounts of academic freedom and other struggles for access to education and civil liberties on American and Canadian campuses. The concept of academic freedom originally recognized two components: *Lehrfreiheit* – the freedom to teach – and *Lernfreiheit* – the freedom to learn. The professional right to academic freedom – *Lehrfreiheit* – became well established in North America. While faculty struggled for professional protections for their working conditions, students were also actively departing from administrations' *in loco parentis* relationship and attempting to establish their independence in the academy and in civil society. Students sought for less infantilization and established greater autonomy to organize and associate, to participate in civic engagement and political activism, and to transform educational policy and academic programming. Significant changes occurred during the sixties because of greater faculty security through the rise of tenure and academic freedom protections, in conjunction with a more vocal and diverse student population who were compelled to be more engaged with their lived experiences on campuses and how they related to the real world around them. However, what resulted from campus activism in the sixties was greater student participation in university governance, student influence on curriculum and academic programming, and more independent and autonomous student organizing. Some more recent manifestations of student academic freedom, particularly in the United States, have been problematic, fostering competing interests between the right of the student and the instructor. In reality, the threats of academic freedom violations against academic staff, such as threats to tenure and collegiality, and corporate interests affecting teaching and research, have real implications for students. Thus, through the review of the literature, it is possible to consider for both the tensions and possibilities of beginning to frame role related student rights in the academy. The reinforcement of civil liberties on campuses should be

asserted in order to support the pursuit of education for the common good and for the development of critical independence of mind.

In order to begin situating higher education within Canadian jurisprudence, Chapter 3 examined the interaction between higher education and the law in Canada. It accounted for the evolution of education jurisprudence vis à vis the introduction of the *Canadian Charter of Rights and Freedoms*.⁴⁹⁰ This analysis that, while the Supreme Court has conservatively demarcated universities from *Charter* scrutiny in the context of employee relations, the *Charter* still has influence and relevance on campus. Even though universities continue to dispute their obligations to uphold the *Charter*, it can be interpreted that such resistance in part comes from a position of risk or liability aversion and not necessarily an aversion to the principles of the *Charter*. In other words, the opposition to *Charter* claims by universities may come more from an interest in being less susceptible to over-litigation, or as Gadjia (2009) describes as the “legalization of the academy.” Unfortunately, administrators in the process of distancing themselves from *Charter* scrutiny have relied on a distorted position of academic freedom – one that is equated with institutional autonomy. And even more unfortunately, while there are certainly positive and progressive interests in universities committed to the principles of equality, expression and other civil liberties, there may also be other forces attempting to limit them. Thus, while universities may be liability averse, their activities and strategic plans supporting the growing commercialization of university activities, and the legal activities associated with technology transfer, spinoffs, and so on, indicate a general willingness to participate in certain types of escalating legal activities on campus. I maintain that universities ought to stop fighting against *Charter* scrutiny in the courts.

⁴⁹⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Student discipline, in particular, requires *Charter* scrutiny and *Pridgen*,⁴⁹¹ albeit not as unequivocal on the *Charter* matter as ideal, provides a step forward in showing how principles of student expression on campus can be upheld.

Even though universities may not be subject to *Charter* scrutiny, legislation that governs them is and thus there are opportunities to explore where civil liberties can be extended. I examine in this thesis the role of student associational and expressive activities on campus as they intersect between general liberties and the role-related student activities. Student collective action in universities has been important for political action, social and cultural diversity, and student speech on campus. Further, student associating is a major part of the student experience – from coming together for athletics to student press to political activities. The central students' union is the crucial hub for facilitating unity and solidarity among the student body. This is why Chapter 4 examines unionism as it is protected, at least minimally protected, by the *Charter*. It examines threats to students' union security, which have occurred internationally and occasionally creep into the discourse of Canadian campuses. The criticisms against student political engagement, I argue, are undemocratic, attempting to marginalize the diverse and energetic student demographic from engaging in the sometimes frustrating democratic structures available. The calls for voluntary student unionism harm the pursuits of freedom, democratic engagement and even liberation through collective action. These threats to student union security and to defund student groups further suggest collaboration with broader opponents of trade unionism working to undo many fronts of collective action and solidarity in the face of economic recessions and austerity efforts by many governments. Further, it is clear, even in provincial jurisdictions where legislated

⁴⁹¹ *Pridgen v. University of Calgary*, 2012 ABCA 139; *Pridgen v. University of Calgary*, 2010 ABQB 644.

students' union security has been established (such as British Columbia⁴⁹² and Quebec),⁴⁹³ that such legislative protections continue to be subject to threats. The exclusion of union leaders from university governing bodies and the discretionary powers of the minister of education in Quebec to de-fund and remove accreditation from student associations both indicate efforts to disempower collective student voices and constitutional challenges against mandatory student union membership. While there is no single archetype for student union security, I argue that the existing provincial legislative frameworks in BC and Quebec ought to be modeled in all Canadian provinces and students will need to be vigilant to opposing other legislation or legal challenges which undermine student collective organizing. Further, I suggest that the pursuit of student right to strike legislation is likely an ineffectual pursuit, given the weak jurisprudence available to support associational activities. Students will need to be vigilant to assert their rights to assemble, express, and associate and to engage politically and socially in the world around them.

The free and critical exchange of thoughts and ideas are at the core of the purpose of the contemporary university. Yet, the safeguarding of unfettered intellectual thought on campus is being questioned. The fifth chapter navigates and interrogates these continued controversies and conflicts in freedom of expression debates on campus. It observes that the trend of increased police presence and regulatory practices is seemingly aimed to silence dissenting opinions – particularly as they relate to educational policies or labour disputes. It also examines the problem of regulatory practices aimed to prevent discrimination and harassment where such discursive activities are susceptible to co-optation intended to silence criticism and controversy on

⁴⁹² *College and Institute Act*. [RSBC 1996] CHAPTER 52; *University Act*. [RSBC 1996] CHAPTER 468.

⁴⁹³ *An Act respecting the accreditation and financing of students' associations*. R.S.Q., chapter A-3.01

campus. Attention is also drawn to how space booking policies are being used to limit certain expressive extra-curricular activities, which students have fought to have access to for decades on Canadian campuses. The obstacles being placed on use of campus space for organizing and debate through changes to institutional space booking policies requires continued examination and critique. Additionally, campuses need to engage in a much more meaningful and self-reflective dialogue about the exercise of power and subjugation in post-secondary institutions. This means that a frank discussion needs to occur about the discourse of “civility”, “balance”, and “neutrality” as these concepts can be subject to co-optation to sanitize or obfuscate critique of powerful interests. Students, faculty, and university administrators ought to be much more prepared to confront what appears to be a double standard creeping into Canadian universities when it comes to debate on certain issues.⁴⁹⁴ Criminal and human rights codes will continue to be important for preventing hate and violence. And universities must be prepared to commit to education, dialogue, deliberation, and expression around issues of discrimination and subjugation. In the face of proliferating quasi-judicial policies in universities that are still by and large exempt from *Charter* scrutiny, students and faculty will need to continue to insist on high standards of recognition for civil liberties in such policies and be prepared to challenge them when they are used inappropriately. It is especially in the area of expression vis à vis harassment and discrimination that a critical examination must be applied to scrutinize how interests of the ruling relations may distort the purported intents of respectful workplace policies and student codes of conduct.

⁴⁹⁴ Nadeau and Sears, 2010.

Analysis

Civil liberties have a fundamental place in society. Our universities have a responsibility to uphold and maintain civil liberties – associational freedoms, freedom of assembly, religious and cultural diversity and expressive activities. Academic freedom is as important as ever today – for faculty and students and the broader public. A discussion of academic freedom needs to be revived in light of the regressive moves coming from university presidents and other sources. The AUCC's departure from a commitment to a broad notion of academic freedom and freedom of expression and to committing to *Charter* principles on campus indicates a worrying trend, particularly as it continues to emphasize and celebrate partnerships with the private sector.⁴⁹⁵ Universities need to remain broadly democratic, not concentrated in their administrative powers or controlled by private and/or corporate interests.

Many facets of the law interact with the principle of academic freedom. The ideal of academic freedom, however, is a principle that must be debated amongst the academic community and the public – and not confined to definitions that emerge through the courts. The principles of academic freedom for academic workers can and should continue to be negotiated through collective agreements – especially including academic freedom provisions among the increasingly casualized work force. Tenure will continue to be a necessary mechanism for safeguarding academic freedom for academic staff. It needs to be vigorously defended to preserve the ideals of academic freedom since, when academic staff are able to take risks, engage in critical debate and inquiry, the student critical independence of mind can be fostered.

⁴⁹⁵ [For example, AUCC's *Open Doors*, *Open Knowledge* events across Canada profile campus research initiatives with private sector]. See Association of Universities and Colleges in Canada "Canada's Universities showcase benefits of private sector partnerships" (8 November 2012) News release, online: Association of Universities and Colleges in Canada <<http://www.aucc.ca>>.

The recognition of how civil liberties interplay with the role-related rights in the scholarly community will continue to be critical. Legislation (labour relations, post-secondary, student association) and university policies must recognize robust safeguards for associational and expressive freedoms. Canada needs these robust protections in order to maintain vibrant campuses that can foster rigorous, dynamic, and necessarily controversial debates and ideas.

Strategies to defend the freedom to teach and learn can benefit from being reflexively grounded in critiques of power and discursive relations. As Dorothy E. Smith (2000) argued, we need to be prepared to look at the ways institutions participate in the perpetuation of subjugation and inequalities if we are going to meaningfully advance the path towards ideals of teaching and learning. Additional research and analysis should be pursued to critically examine aspects of student discipline, student dissent, and student associating in Canada. More systematic research could investigate trends in the application of codes of conduct in Canadian universities – looking into patterns based on various student demographics. Such research may assist to identify whether such codes are operating to impose inappropriate limitations on *Charter*-protected activities. Further, recognition of the rights of peaceful assembly, association, and expression by fostering spaces for students to engage in the realization of these rights and committing to democratic ideals in university governance will both assist universities in facilitating authentic and critical education in Canada.

In regards to threats to unionism on Canadian campuses, more investigation into the funding and support coming from non-student organizations attempting to regulate student debate or undo student organizing through the de-funding of Public Interest Research Groups and provincial and national student organizations may also help in understanding the threats to democratic student organizing on Canadian campuses. Increased public discussion about the implications of voluntary student unionism on

campus life, as well as the principles behind freedom of association, will be necessary as legal challenges continue to emerge. Student association legislation in every province would be ideal to ensure stability, but open discussions about the importance of associating will be critical as unions in general continue to be under attack.

Advocates of academic freedom and campus liberties will need to be wary of distorted presentations of the freedom to learn. Critical dialogue needs to continue to challenge the sophisticated co-optations of language such as academic freedom, discrimination, and free speech to silence political discourse on campus. Because of the possibility of the distortion of such ideals by powerful interests, continued scrutiny of quasi-judicial activities in universities, such as respectful workplace policies and codes of conducts, will be crucial. Faculty and students alike need to exercise vigilance to identify the co-optation of language of discrimination and harassment with the purpose of silencing criticism.

In this vein, students and faculty should be attentive to how the concept of academic freedom can also be used to repress.⁴⁹⁶ In other words, faculty should not use academic freedom to shield them from feedback from students regarding concerns of marginalization and discrimination in the classroom. Administrations also need to avoid standing behind the notion of academic freedom to justify their refusal to meaningfully protect student expression or other civil liberties. Moreover, students should not claim that academic freedom protects them from not hearing about controversial topics or even offensive materials or debates that have relevance to either the curricular or extra-curricular practice of education. Smith argues that "dialogue implies a serious commitment to listening to the other and to helping the other bring into speech what is

⁴⁹⁶ Dorothy E. Smith, 2000.

sometimes not easily spoken."⁴⁹⁷ Academic freedom needs to be used as a tool to challenge orthodox, hegemonic, and dominating ideology, not as one to protect it.

In order to promote academic freedom, it will be crucial for faculty to continue to defend the principles of academic freedom in collective agreements, faculty handbooks, and other institutional policies. They also need to challenge pressures to engage in highly standardized and commercialized acts of education which orient students as consumers. In this respect, faculty must be prepared to join with students to defend their learning conditions. This means that they ought to continue to recognize that students must be able to choose from a range of courses and that they need to access education without massive financial obstacles. Further, students should have spaces to pose relevant and meaningful and thought-provoking questions inside *and* outside the classroom, thereby participating in a critical pedagogical process. Faculty and students will have to collectively defend the right to maintain curriculum and academic programming controlled through a collegial structure. As such, students and faculty need to actively work to ensure that senates and other governing bodies are authentically democratic and collegial. Furthermore, universities ought to be diligent to not sign away these fundamental democratic functions to private interests.

If academic freedom is the relationship between teaching and learning freedoms, then the rights and responsibilities of the instructor are connected to the rights and responsibilities of the student. The task of the teacher, in fostering critical thinking and independence of mind, is to educate the student. It is then the duty of the university to promote and uphold the conditions for such transformative pedagogical practices. Such a commitment to education requires support for spaces for processing, questioning, practicing, engaging in critical debate and dissent, and even at times civil disobedience against unjust laws and policies that unduly limit freedom. If universities continue to

⁴⁹⁷ Smith, 2000, p. 156.

close in on available spaces for faculty and students, permitting instead private companies more access and entitlement to the classrooms, communal spaces, and governing bodies of universities, then academic freedom is at risk.

Faculty and students, by defending the freedom to teach and the freedom to learn, will need to work together to revitalize public dialogue and critical thinking, argues Giroux and Giroux (2004). One way this can happen is by continuing to defend academic freedom. But it also must occur by recognizing their common struggles to associate effectively and autonomously from administrative intervention and to support freedom of expression. This will sometimes manifest through interactions with the law, but it will more often and more likely occur through education, debate, dialogue and discourse. Some of these debates will lead to questioning and challenging of unjust policies and laws. Despite efforts to publicly persecute student leaders through codes of conduct or criminal charges, continued encouragement of principled and meaningful student organizing will be necessary to preserve authentic and critical learning conditions and access to education on Canadian campuses. Such activities will assist in the assertion and preservation of higher education in Canada committed to the common good.

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